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# If you Speak Up, Must you Stand Down: Caperton and Its Limits

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## IF YOU SPEAK UP, MUST YOU STAND DOWN: CAPERTON AND ITS LIMITS

*Richard M. Esenberg\**

. . . *The hungry Judges soon the Sentence sign,*  
*And Wretches hang that Jury-men may Dine . . .*<sup>1</sup>

### INTRODUCTION

The idea of judicial impartiality is an old one. Chief Justice of the Indiana Supreme Court Randall Shepard reminds us that, in the book of Deuteronomy, Moses is said to have instructed judges of the tribes of Israel that they “shalt not respect persons” nor “take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous.”<sup>2</sup> The author of Leviticus cautions that “you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.”<sup>3</sup> King Alfred the Great required not only that magistrates be literate, but regarded judges who “slay folk by false judgments” to be guilty of homicide.<sup>4</sup> In one year, he had forty-four judges hanged for such false judgments.<sup>5</sup> The *Lex Visigothorum* (*Visigothic Code*) required that judges who had ruled falsely due, not to ignorance, but to partiality, cupidity, or for the sake of profit would be required to make restitution to the wronged party.<sup>6</sup> If unable to make restitution, the judge was to “be delivered as a slave to him to whom he is indebted, or, after having been exposed in public . . . receive fifty lashes.”<sup>7</sup>

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1. ALEXANDER POPE, *The Rape of the Lock*, in 2 POEMS OF ALEXANDER POPE: THE RAPE OF THE LOCK AND OTHER POEMS 144, 170 (Geoffrey Tillotson ed., Routledge 1993) (1940).

2. Randall T. Shepard, *Campaign Speech Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1060–61 (1996) (quoting *Deuteronomy* 16:19 (King James)).

3. *Leviticus* 19:15 (Revised Standard Version).

4. Shepard, *supra* note 2, at 1061 n.3 (quoting THE MIRROR OF JUSTICES 166 (William Joseph Whitaker ed., 1895)).

5. *Id.*

6. THE VISIGOTHIC CODE bk. II, tit. I, ¶ XIX, at 28 (S.P. Scott ed. & trans., 1910).

7. *Id.*; accord M.H. Hoefflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages*, 2 LAW & HIST. REV. 79, 92 (1984) (citing provisions of the *Visigothic Code* that punish judicial misconduct such as

In *Caperton v. A.T. Massey Coal Co.*,<sup>8</sup> the Supreme Court considered a less extreme approach to the problem of judicial bias. The Court has long recognized that the constitutional guarantee of due process may require recusal of judges holding an interest in the outcome of a case.<sup>9</sup> But prior to *Caperton*, the application of this requirement had been limited to cases in which a judge had an individual or official pecuniary interest in the outcome of a case<sup>10</sup> or was, in some sense, acting as both the judge and prosecutor.<sup>11</sup> *Caperton* moved beyond this, declaring a generalized due process duty to recuse in circumstances in which a judge has an interest that creates an “unconstitutional ‘potential for bias.’”<sup>12</sup> A five-to-four majority held that a successful judicial candidate’s potential “debt of gratitude” to a corporate litigant whose CEO had spent a large amount of money in support of his election required recusal.<sup>13</sup>

The majority and dissent disagreed about whether the decision would launch satellite litigation seeking recusal of judges.<sup>14</sup> They also disagreed over the need for a more specific standard.<sup>15</sup> In my view, there is more potential for mischief than the majority recognized. The absence of clear guidance may very well lead

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bribery).

8. 129 S. Ct. 2252 (2009).

9. *Id.* at 2259–62.

10. *Id.* at 2259–61; *see, e.g.*, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816–17, 820–25 (1986) (finding a due process violation when an Alabama Supreme Court Justice sat on a case while he was the lead plaintiff in a nearly identical case pending in the state’s lower courts); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 57–62 (1972) (finding a due process violation when the mayor, who was in charge of revenue production and law enforcement, sat in judgment of the petitioner who had been charged with two traffic offenses, the funds of which would go to the municipal coffers); *Tumey v. Ohio*, 273 U.S. 510, 514–20, 531–32 (1927) (finding a due process violation when a mayor served as village judge and received supplemental pay from fines he imposed).

11. *Caperton*, 129 S. Ct. at 2261–62; *see, e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (“[A] defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.”); *In re Murchison*, 349 U.S. 133, 134–35, 139 (1955) (holding that the petitioner’s due process rights were violated when the trial judge participated in the charging decision).

12. *Caperton*, 129 S. Ct. at 2262.

13. *Id.* at 2256, 2262, 2265–67.

14. *See id.* at 2265 (“Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree.”); *id.* at 2274 (Roberts, C.J., dissenting) (“But I believe that opening the door to recusal claims under the Due Process Clause . . . will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”); *id.* at 2274 (Scalia, J., dissenting) (“[T]he principal consequence of today’s decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges.”).

15. *Id.* at 2267–69 (Roberts, C.J., dissenting).

litigants to play the *Caperton* card, particularly in high-profile cases before multimember appellate courts. This may well, as the dissent feared, disrupt the operation of state courts and undermine the public confidence in the judicial process that the majority sought to preserve.<sup>16</sup>

While *Caperton* itself provides little guidance, it is highly unlikely that the Court intended to usher in a constitutionally mandated regime of aggressive recusal requirements. The Court repeatedly referred to the facts before it as “rare,” “extraordinary,” and “extreme.”<sup>17</sup> I argue that *Caperton*’s scope and likely application can be informed by the Court’s recent decisions on judicial campaign speech and campaign finance regulation. These cases suggest some limits on a due process duty of recusal that *Caperton* itself did not provide. Part I of this Article considers the *Caperton* case and the likelihood that it will have legs, leading to more frequent attempts by litigants to seek the recusal of potentially “unfriendly” judges. Part II examines the Court’s recent cases on judicial campaign speech and campaign finance regulation, attempting to discern what those cases mean for the interplay between the right of free speech in judicial campaigns and the desire for judicial impartiality. Part III suggests some potential guidelines for the application of *Caperton*.

Before proceeding, it is worth noting that the problems discussed here are most salient with respect to multimember law-developing courts. Candidates and aspirants to such courts are most likely to attract the type of support or to engage in the type of

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16. *Id.* at 2267, 2274.

17. *See, e.g., id.* at 2256 (“[Justice Benjamin] received campaign contributions in an extraordinary amount from, and through the efforts of, [litigant].”); *id.* at 2262 (“Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to [litigant] for his extraordinary efforts to get him elected.”); *id.* at 2263 (“Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.”); *id.* at 2265 (“[T]he fact remains that [litigant’s] extraordinary contributions were made at a time when he had a vested stake in the outcome [of his pending case].”); *id.* (“On these extreme facts the probability of actual bias rises to an unconstitutional level.”); *id.* (“Our decision today addresses an extraordinary situation where the Constitution requires recusal.”); *id.* (“The facts now before us are extreme by any measure.”); *id.* (“It is true that extreme cases often test the bounds of established legal principles . . . . But it is also true that extreme cases are more likely to cross constitutional limits . . . .”); *id.* at 2265–66 (“In each [prior recusal] case the Court dealt with extreme facts that created an unconstitutional probability of bias . . . . The Court was careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level.”); *id.* at 2266 (recognizing that the Court was not “flooded” with motions after the prior recusal cases, which was “perhaps due in part to the extreme facts those standards sought to address”); *id.* at 2267 (holding that litigant’s contributions presented one of the “rare instances” that requires judicial recusal).

debate that may lead to calls for recusals. At the same time, recusal—by disabling those chosen by the electorate or the appointing authorities from participation in the law-development process—may create greater tensions between rights of free speech and association and the logic of the applicable judicial selection mechanism.

### I. *CAPERTON V. A.T. MASSEY COAL CO.*

Some have seen *Caperton* as an instance of life imitating art<sup>18</sup>—in this case, John Grisham's novel *The Appeal*, in which shady corporate interests locate and support a Manchurian candidate for the Mississippi Supreme Court who will rule in their favor in a pending case.<sup>19</sup> While the comparison may be closer in legend than reality, *Caperton* was—in many respects—an extraordinary case.

#### A. *The Caperton Result*

A jury had “found . . . A.T. Massey Coal Co. and its affiliates . . . liable for fraudulent misrepresentation, concealment, and tortuous interference with existing contractual relations.”<sup>20</sup> It awarded plaintiffs fifty million dollars in damages.<sup>21</sup>

After the verdict, but before the appeal, Justice Warren McGraw ran for reelection to the West Virginia Supreme Court of Appeals.<sup>22</sup> He was opposed by a Charleston attorney named Brent Benjamin.<sup>23</sup> Don Blankenship, CEO of Massey, heavily supported Benjamin's challenge. In addition to the maximum legal contribution of one thousand dollars to the Benjamin campaign itself, Blankenship independently spent half-a-million dollars in support of Benjamin's candidacy.<sup>24</sup> Most significantly, Blankenship donated nearly two-and-a-half million dollars to “And For The Sake Of The Kids,” an independent political organization formed under 26 U.S.C. § 527 that supported Benjamin. Blankenship's contribution constituted over two-thirds of the total amount raised by the organization.<sup>25</sup> His three million dollars in aggregate contributions and expenditures “[was] more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee.”<sup>26</sup> It was alleged that “Blankenship spent \$1 million more than the total amount spent by the campaign

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18. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY (Feb. 16, 2009), [http://www.usatoday.com/news/Washington/2009-02-16-grisham-court\\_N.htm](http://www.usatoday.com/news/Washington/2009-02-16-grisham-court_N.htm).

19. *Id.* See generally JOHN GRISHAM, *THE APPEAL* (2008).

20. *Caperton*, 129 S. Ct. at 2257 (majority opinion).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

committees of both candidates combined.”<sup>27</sup>

Benjamin won the election with a bit more than 53% of the vote.<sup>28</sup> While the proceedings in Massey’s appeal in the *Caperton* case were complicated, the bottom line is that Benjamin refused to recuse himself and voted with the majority as the verdict against Massey was overturned by a three-to-two vote.<sup>29</sup> The *Caperton* plaintiffs sought review in the U.S. Supreme Court, alleging that their due process rights had been violated.<sup>30</sup> The Court granted review and, by a five-to-four vote, reversed the decision of the West Virginia Supreme Court of Appeals.<sup>31</sup>

As noted above, although the Court repeatedly referred to the facts before it as “rare,” “extraordinary,” and “extreme,”<sup>32</sup> it announced a broadly formulated due process right, suggesting that courts must undertake an inquiry to determine “whether the average judge in [the same] position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”<sup>33</sup> This inquiry is designed to be objective, as the test of recusal is “not whether the judge is actually, subjectively biased.”<sup>34</sup> Rather, recusal may be required when “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”<sup>35</sup>

In the context of a judicial election in which one party to the case is claimed to have supported a judicial candidate in a way that creates the appearance of bias, recusal may be constitutionally mandated when a contributor with a personal stake in a case “had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>36</sup>

Applying that principle to the facts before it, the Court said that “[t]he inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”<sup>37</sup> In the case of Massey and Justice Benjamin, it concluded that, even if Blankenship’s support may not have been a necessary and sufficient

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27. *Id.* Exorbitant expenditures on judicial candidates are likely to become more and more common. *See infra* notes 62–63 and accompanying text.

28. *Caperton*, 129 S. Ct. at 2257.

29. *Id.* at 2257–58.

30. *Id.* at 2259.

31. *Id.* at 2257–59.

32. *See supra* note 17.

33. *Caperton*, 129 S. Ct. at 2262.

34. *Id.*

35. *Id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

36. *Id.* at 2263–64.

37. *Id.* at 2264.

cause of Justice Benjamin's victory, its influence was "significant and disproportionate."<sup>38</sup> The Court emphasized "[t]he temporal relationship between the campaign contributions, the justice's election, and the pendency of the case," noting that "[a]lthough there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome."<sup>39</sup> Given the size of the contributions, they "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."<sup>40</sup> In this case, Justice Benjamin—or, more accurately, a judge in Justice Benjamin's position—would feel a debt of gratitude toward Blankenship for his extraordinary campaign efforts on his behalf.

The Court stated that it did not expect a deluge of recusal motions,<sup>41</sup> but it suggested no further limiting principles on the general due process duty of recusal. Noting that a flood of recusal motions had not followed the Court's earlier recusal decisions, Justice Kennedy observed that "[c]ourts proved quite capable of applying the standards to less extreme situations."<sup>42</sup> Because states can and do "adopt recusal standards more rigorous than due process requires," he expressed the view that "most disputes over disqualification will be resolved without resort to the Constitution" and that the standard adopted in *Caperton* will be "confined to rare instances."<sup>43</sup>

In dissent, Chief Justice Roberts noted that, prior to *Caperton*, the Court had recognized only two instances in which due process might require recusal: "when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts."<sup>44</sup> He criticized expansion of the requirement to a case in which the judge's interest is more indirect.<sup>45</sup> This, in his view, expanded the concept in a way not readily translated into a "judicially discernible and manageable standard."<sup>46</sup> He posed forty questions left unanswered by the majority opinion.<sup>47</sup> Of course, few decisions of any significance fail to leave unanswered questions, and traditional judicial practice hesitates to decide more than is necessary to dispose of the case at

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38. *Id.* at 2263–64.

39. *Id.* at 2264–65.

40. *Id.* (internal quotation marks omitted).

41. *Id.* at 2265.

42. *Id.* at 2266.

43. *Id.* at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

44. *Id.* (Roberts, C.J., dissenting).

45. *Id.*

46. *Id.* at 2272. "[T]he standard the majority articulates—'probability of bias'—fails to provide clear, workable guidance for future cases." *Id.* at 2269.

47. *Id.* at 2269–72.

hand. But, for the dissenters, the Court had provided no means by which these questions might be answered.<sup>48</sup>

Justice Scalia, writing separately, agreed with Chief Justice Roberts:

What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice. The Court's opinion will reinforce that perception, adding to the vast arsenal of lawyerly gambits what will come to be known as the *Caperton* claim.<sup>49</sup>

Chief Justice Roberts expressed his fear that “opening the door to recusal claims under the Due Process Clause, for an amorphous ‘probability of bias,’ will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.”<sup>50</sup> He expressed the hope that he will be proven wrong.<sup>51</sup>

#### B. *Caperton's Future*

Time will tell whether Chief Justice Roberts's fear or hope is realized. There are reasons—based on *Caperton's* rationale and the evolving character of judicial elections—to suspect that *Caperton* motions will be more prevalent than the majority assumed. As several commentators have observed, Justice Kennedy may have been trying to resolve a “hard case” without making “bad law”<sup>52</sup> by implying that the *Caperton* decision was “good-for-this-day-and-this-train-only.”<sup>53</sup> It may be that, for Justice Kennedy, the potential for bias is like pornography was for Justice Stewart—he knows it when he sees it.<sup>54</sup> There are certainly times when such reasoning may be

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48. *Id.* at 2267.

49. *Id.* at 2274 (Scalia, J., dissenting).

50. *Id.* (Roberts, C.J., dissenting).

51. *Id.*

52. See, e.g., Stephen M. Hoersting & Bradley A. Smith, *The Caperton Caper and the Kennedy Conundrum*, 2009 CATO SUPREME CT. REV. 319, 319 (“*Caperton v. Massey Coal* typifies the old maxim that hard cases make bad law. In *Caperton*, the Supreme Court created a new, largely unworkable standard for judicial recusal, then elevated it to a matter of constitutional due process.” (footnote omitted)).

53. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 94 (2009).

54. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within [‘hard-core pornography’]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.” (emphasis added)). One of my copanelists at a conference held shortly after the issuance of *Caperton*



the best we can do.<sup>55</sup>

One commentator has argued that *Caperton* motions will be rare because they will largely be self-executing—a lawyer will be hesitant to file *Caperton* motions when a judge fails to voluntarily recuse himself because “the lawyer may safely assume that the judge is predisposed to deny the formal recusal motion.”<sup>56</sup> Given *Caperton*’s emphasis of the “extreme” nature of its facts, success at the appellate level will be “rare.”<sup>57</sup> Further, review of the failure of state supreme court justices to recuse themselves could only occur in the United States Supreme Court,<sup>58</sup> an unlikely event given the rarity with which certiorari is granted. All of this should add up to a reluctance of lawyers to play the recusal “gambit,” reflected in the adage that “[w]hen you strike at a king, you must kill him.”<sup>59</sup>

But it is far from clear that the *Caperton* facts were as extreme or unusual as the majority assumed them to be. As the dissent and a number of commentators have observed, there were other large sums of money being spent on the Benjamin-McGraw race, much of it by interest groups who could be expected to have matters before the court.<sup>60</sup> Although Blankenship’s spending may have helped

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suggested that Justice Benjamin’s failure to recuse himself was worthy of treatment on a recurrent segment on *Saturday Night Live* called “Really!?! with Seth & Amy” in which Seth Meyer and Amy Poehler make fun of what they take to be obviously poor decisions. See, for example, the show’s treatment of Representative Joseph Wilson’s outburst during a speech to Congress by President Obama. *Saturday Night Live: Weekend Update: Thursday* (NBC television broadcast Sept. 17, 2009), available at [http://www.nbc.com/Saturday-night-live/video/update-thursday-part-3/1158379/?\\_cid=thefilter](http://www.nbc.com/Saturday-night-live/video/update-thursday-part-3/1158379/?_cid=thefilter) (“Hey, Joe! Yelling ‘You lie!’ would be rude to a valet or a waiter, so, maybe don’t yell it at the President! Really! And, also, next time, can I suggest ‘You’re a liar!’? ‘You lie!’ sounds like a toddler or someone who just learned English. I mean, really!”).

55. I have argued that this may be the only way to understand and apply the Supreme Court’s recent adoption of a “plausibility” standard for assessing the adequacy of pleadings under Rule 8(a)(2) of the Federal Rules of Civil Procedure in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007). See Richard Esenberg, *To Iqbal or Not To Iqbal?*, PRAWFSBLAWG (Mar. 12, 2010, 9:52 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/03/to-iqbal-or-not-to-iqbal.html>. Additionally, similar reasoning has been adopted in at least one case in England. See *Cadogan v. Morris*, [1998] EWCA (Civ) 1671 (Eng.) (referring to “the well known elephant test[, which] is difficult to describe, but you know it when you see it”).

56. Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 234–35 (2010).

57. *Id.* at 235.

58. See 28 U.S.C. § 1257 (2006).

59. Green, *supra* note 56, at 235 (internal quotation marks omitted). Green attributes the quote to Ralph Waldo Emerson. *Id.* at 235 & n.39. A more modern version can be attributed to the character Omar Little in the HBO series *The Wire*. *The Wire: Lessons* (HBO television broadcast July 28, 2002) (“Ayo. Lesson here ‘Bey. You come at the king, you best not miss.”).

60. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009)

Benjamin win, the race was not particularly close, and there were a myriad of other factors that could have led to Benjamin's victory.<sup>61</sup>

In fact, the amount of money spent on state supreme court and other judicial races has been increasing exponentially.<sup>62</sup> It is not at all unusual for discrete organizations—say plaintiffs' lawyers, public employee unions, or insurance and business groups—to spend comparable sums on statewide races.<sup>63</sup> If the *Caperton* motion is going to become, in Justice Scalia's words, a "lawyerly gambit,"<sup>64</sup> contemporary judicial races seem likely to provide a target-rich environment.

Although there are strategic reasons to avoid recusal motions,<sup>65</sup> lawyers may also rationally conclude that the likelihood of obtaining a particular judge's vote is sufficiently remote that an attempt to remove her from the case is a better play. This is particularly likely to be the case in multimember law-developing courts in which the outcome is less likely to be clear and the campaign cycle is more likely to have included the type of spending and advertising that

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(Scalia, J., dissenting) ("Consumers for Justice—an independent group that received large contributions from the plaintiffs' bar—spent approximately \$2 million in this race."); Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 275–76 (2010) (listing various organizations that contributed money to defeat Justice McGraw).

61. See Andrew L. Frey & Jeffrey A. Berger, *A Solution in Search of a Problem: The Disconnect Between the Outcome in Caperton and the Circumstances of Justice Benjamin's Election*, 60 SYRACUSE L. REV. 279, 282–85 (2010) (attributing Benjamin's victory to factors outside of solely financial support); Rotunda, *supra* note 60, at 272–76 (listing additional factors that contributed to Benjamin's victory). For example, Justice McGraw refused to grant media interviews or to debate his opponent. Frey & Berger, *supra*, at 284. He gave a widely publicized speech that came to be known as the "Scream at Racine," in which he claimed that Republicans, not Democrats, "gave" the electorate abortion and opposition to school prayer, and that the U.S. Supreme Court had "approved gay marriage." Rotunda, *supra* note 60, at 274–75. Of those state newspapers that endorsed candidates for the office, all but one endorsed Benjamin. *Id.* at 273.

62. See JUSTICE AT STAKE CAMPAIGN, *THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000–2008*, at 3 (Jess Rutledge ed., 2008) ("Between 1999 and 2007, candidates for America's highest courts have raised over \$165 million, a remarkable jump from the \$62 million raised between 1993 and 1998."); JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUSTICE, *FAIR COURTS: SETTING RECUSAL STANDARDS* 10 (2008) ("Winning candidates who did not accept public financing raised an average of more than \$650,000 in 2004, up 45% from 2002's average of \$450,000."); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267–68 (2008) ("Contributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role . . . ." (footnotes omitted)).

63. SAMPLE, POZEN & YOUNG, *supra* note 62, at 10.

64. *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting).

65. Kelly M. Falls, Note, *A Quorum of One: Redefining Recusal Standards in the Federal Trade Commission*, 19 GEO. J. LEGAL ETHICS 705, 714 (2006).

seems most likely to lead to a *Caperton* issue.

1. *Caperton Unbounded*

All *Caperton* tells us is that recusal may be constitutionally required whenever there is a “potential for bias” that, when viewed objectively, may cause a judge to fail to “hold the balance nice, clear and true.” This is a rather protean standard,<sup>66</sup> potentially applicable in a variety of ways. It is unclear, for example, why *Caperton*’s standard would be limited only to large campaign expenditures or contributions by a particular litigant. A successful judicial candidate might also be thought to owe a “debt of gratitude” to an advocacy organization or interest group that has made independent expenditures on her behalf and that, while not a party to a subsequent case, appears as an amicus or is otherwise strongly interested in the outcome.<sup>67</sup> Given Justice Kennedy’s capacious standard, it is possible to argue that a “debt of gratitude” to an important supporter or group of supporters might be repaid not only by fealty to a position that serves a supporter’s pecuniary interest, but also his or her ideological interest.<sup>68</sup> As we will see, there is more robust evidence that “ideological” or “political” interests affect judicial decision making—even when they are nothing more than a recognition of how the electorate might respond—more than contributions.<sup>69</sup>

Nor is it clear that support from an interest group must be formal, organized, or involve concerted or coordinated actions by the participants. If a judicial candidate has enjoyed outsized support from trial lawyers or business executives, litigants might argue—and a court might hold—that there is a “potential” for bias in favor

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66. See Rotunda, *supra* note 60, at 256 (“Sometimes a judge must disqualify himself because of campaign contributions or independent expenditures by an individual who is not a lawyer or party before the Court but has an interest in a case that is before the court. The question is when? *Caperton* does not answer that with any precision, except to say that it all depends.” (footnotes omitted)).

67. Following the 2007 Supreme Court election in Wisconsin, there were motions and public calls for the recusal of newly elected Justice Annette Ziegler in a case addressing the applicability of the sales tax to “customized” software. See Editorial, *Judicial Conflicts: Step Aside in this Case*, MILWAUKEE J. SENTINEL, Nov. 29, 2007, at 12A. Hundreds of millions of dollars were at stake. A business lobbyist group, known as Wisconsin Manufacturers Commerce (“WMC”), had spent over two million dollars in support of Justice Ziegler’s candidacy and had filed an amicus brief in the case. Patrick Marley & Stacy Forster, *Van Hollen Has Ties to Case: Business Lobby Spent Millions on Attorney General, Ziegler in Elections*, MILWAUKEE J. SENTINEL, Nov. 30, 2007, at 1B. Justice Ziegler declined to recuse herself and ultimately wrote the majority opinion in favor of the position supported by WMC. *Wis. Dep’t of Revenue v. Menasha Corp.*, 754 N.W.2d 95 (Wis. 2008).

68. See *infra* notes 84–95 and accompanying text (discussing the recusal motions filed against Wisconsin Supreme Court Justice Michael Gableman as a result of his perceived ideological opposition to criminal defendants).

69. See *infra* notes 134–35 and accompanying text.

of the interests of a group that has disproportionately supported the candidate's election.<sup>70</sup>

Like Chief Justice Roberts, we can go on. There is no obvious reason why "debts of gratitude" must be limited to contributions and expenditures. There are other forms of support that might come from a potential litigant or interested party—endorsements of law enforcement or the organizational efforts of unions and other advocacy organizations—that might be seen to offer comparable advantages to a favored candidate.<sup>71</sup> Professors Stephen Hoerstring and Bradley Smith argue that newspaper endorsements can be worth an increase in voter share of one to five percentage points.<sup>72</sup> Further, there may, in fact, be no need for "support" at all. It seems just as plausible that a "potential for bias" may arise from a "desire for vengeance" against a candidate's opponents as from a "debt of gratitude" to her supporters.<sup>73</sup>

Nor is it clear, under *Caperton*, that the due process problems that may be presented by support of a judicial aspirant are limited to elections. Indeed, it seems plausible to believe that a "debt of gratitude" may be owed not only to those who have helped to elect a judge, but to those who have appointed him or helped to secure his appointment in states where that is the route to the bench.<sup>74</sup>

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70. For example, Texas Supreme Court races were often claimed to be tainted by large individual contributions from numerous plaintiffs' lawyers. See Brenda Sapino Jeffreys, *Plaintiffs Firms Bow Out as Big Campaign Donors*, TEX. LAW., Mar. 9, 1998, at 1.

71. See Hoerstring & Smith, *supra* note 52, at 336 ("[*Caperton*'s] logic can be extended to find 'bias' in any of a range of other independent political activity, in multiple forms and from multiple actors, long recognized as vital to democracy. A group of community organizers that work to get out the vote in neighborhoods that disproportionately support a candidate would 'benefit' that candidate and may make him 'grateful.'")

72. *Id.* at 337 & n.73.

73. See *id.* at 338 ("Whatever recusal standard would apply to Justice Benjamin would presumably apply equally to his opponent, for in a system of winner-take-all elections, whether the \$3 million was spent independently to support the judicial candidate or to oppose him matters little to the perceived impartiality of the judge.")

74. Even in states that elect their judiciary, many judges are initially appointed to fill a vacancy. For example, in my home state of Wisconsin, Governor Jim Doyle appointed Louis Butler to replace Justice Diane Sykes, who had been confirmed as a judge of the Seventh Circuit Court of Appeals. It was widely speculated that Democrats agreed not to oppose Judge Sykes's nomination because it would give Governor Doyle, a Democrat, an opportunity to appoint her replacement. See Annie L. Owens, Comment, "All Politics Is Local": The Politics of Merit-Based Federal Judicial Selection in Wisconsin, 88 MARQ. L. REV. 1031, 1048–50 (2005). At the time, the Governor wished to enter into amended compacts with Indian tribes to expand casino gaming and obtain badly needed revenue to balance the state's budget. See Editorial, *Doyle's Risky Casino Play*, MILWAUKEE J. SENTINEL, Feb. 25, 2003, at 14A. A recent four-to-three decision of the Wisconsin Supreme Court (with Justice Sykes in the majority) seemed to hold that the Governor's ability to do so was severely

Although Professor Lawrence Lessig has argued that an “affinity” for the policies of, for example, the President who has appointed a judge is “different” from financial support and “is arguably part of the design of presidentially selected judges,”<sup>75</sup> it may be equally true that an “affinity” for the policies (or views) of those who make up the coalitions and interests that elect a judge are part of the “design” of electing judges. And just as disentangling the potential for an improper quid pro quo in the federal context (i.e., a judge who supports the position of the administration or party who appointed him for no reason other than “pay back”) is difficult in the appointment process, it may be equally difficult in the context of campaign support.<sup>76</sup>

What of speech by the candidate himself (e.g., a pledge to support law enforcement or to protect families from dangerous products or even to “end the practice of recognizing rights not expressly set forth in the Constitution”)? Would such speech create a “potential for bias” because that candidate may not want to rule in a way that would be seen as inconsistent with prior statements? Does it matter if the speech is made outside the campaign context?

Must there, in fact, be speech at all? Reviewing the Court’s cases concerning judicial elections, Professor Pamela Karlan concludes that they recognize that structural features of judicial elections (including what candidates are permitted to say and who

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limited or prohibited by a recent constitutional amendment banning casino gaming. See *Panzer v. Doyle*, 680 N.W.2d 666, 692–98 (Wis. 2004). Following Justice Butler’s appointment, the court essentially reversed its decision in *Panzer*, permitting the Governor to agree to any amount of casino gaming as long as it was done by amending preexisting compacts. *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 444 (Wis. 2006). Although I have been critical of the *Dairyland* decision, see, e.g., RICK ESENBERG, A COURT UNBOUND? THE RECENT JURISPRUDENCE OF THE WISCONSIN SUPREME COURT 4 (2007), [http://www.fed-soc.org/doclib/20070329\\_WisconsinWhitePaper.pdf](http://www.fed-soc.org/doclib/20070329_WisconsinWhitePaper.pdf), I would never suggest that Justice Butler failed to “hold the balance, nice, clear and true.” Nevertheless, some may see something of a John Grisham plot here as well and argue that Justice Butler owed a “debt of gratitude” to the Governor that created a potential for bias in a case involving hundreds of millions of dollars in state revenue. I raise the example to suggest that “appearances” can arise in many ways.

75. Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 110 (2009).

76. While Professor Lessig argues that there is no theory—or at least no theory that we are likely to accept —“that makes money even arguably relevant to the legal determinations of a court,” *id.*, ruling in favor of the Governor’s or President’s position in gratitude for one’s appointment is no more relevant. Equally, money can be a proxy for support of a candidate’s judicial philosophy, just as appointment of a like-minded jurist can reflect an expectation of, but not a bargain for, desired results. As we will see later, the potential for a quid pro quo may be more readily discerned in certain circumstances like those present in *Caperton*, i.e., outsized contributions (or expenditures) by an individual party in a very significant and imminent case. But the principle announced by Justice Kennedy is not so limited.

supports each candidate) can affect electoral outcomes, and that electoral outcomes can affect adjudicatory results.<sup>77</sup> There is ample evidence that electoral concerns can affect the outcomes of certain highly salient criminal cases without regard to anything said or any money spent on a campaign.<sup>78</sup> If this is so, and if *Caperton* means that it is a violation of due process to sit on a case in which the adjudicatory outcome may impact or have been impacted in some way by the electoral process and outcome, then “the logic of *Caperton* is far more destabilizing than the Court might have intended.”<sup>79</sup> It may well “bring the Court onto a collision course with the practice of electing judges.”<sup>80</sup> Although Professor Karlan has no doubt that courts will reject claims by criminal defendants that electoral pressures deprive them of due process, it will be due to pragmatism rather than principle.<sup>81</sup> *Caperton*, she concludes, “cannot be so easily cabined.”<sup>82</sup>

## 2. Caperton on the Ground

There are some early indications that recusal motions will be more prevalent than the *Caperton* majority assumed. In my home state of Wisconsin, for example, there has been a series of motions—some filed before *Caperton*—seeking the recusal of newly elected

77. Karlan, *supra* note 53, at 89.

78. See, e.g., Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793–94 (1995) (noting that while judges in elective jurisdictions are far more likely to override jury sentences of life to impose death sentences, in the one state with an appointed judiciary that permits judicial overrides, judges more often override death sentences to impose life sentences); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (noting the “substantial” risk that judges will “receive and act upon” the message “that if they want to avoid negative votes, it is best to produce results with which the voters will agree” and suggesting that that message may have influenced the decisions of two members of the California Supreme Court faced with retention votes); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (concluding on the basis of an empirical analysis of sentencing practices in Pennsylvania that judges subject to retention elections imposed sentences for several serious crimes that were “significantly longer the closer the sentencing judge is to standing for reelection”); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 204–06 (2004) (discussing the effects of judicial elections on sentencing determinations).

79. Karlan, *supra* note 53, at 94. More than one commentator has argued that judicial elections violate the due process rights of criminal defendants. See, e.g., Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101 (2006).

80. Karlan, *supra* note 53, at 92.

81. *Id.* at 93–94.

82. *Id.* at 93.

Justice Michael Gableman.<sup>83</sup> These motions argue that certain advertisements and other communications by the Gableman campaign itself reflect—or create the potential for—an improper bias against criminal defendants.<sup>84</sup> A much-publicized e-mail from a lawyer in the state public defenders office urged members of the defense bar to make similar motions.<sup>85</sup>

These motions have emphasized not merely the fact of substantial independent expenditures, but the nature of the message conveyed. The advertisements attacked Gableman's opponent for being soft on crime and having been a public defender, and praised candidate Gableman for his support of law enforcement and former service as a prosecutor.<sup>86</sup> They criticized the outcome in certain cases in which Justice Butler had voted to uphold the claim of a criminal defendant.<sup>87</sup> The motions were based not simply on Justice Gableman's speech, but also on the speech of the groups supporting him.<sup>88</sup> None of those groups have any stake in the criminal justice system other than that of any other group of

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83. See *State v. Allen*, 778 N.W.2d 863, 887, 888 & n.85 (Wis. 2010) (describing a “cottage industry” of recusal motions that includes several motions filed against Justice Gableman). Justice Gableman defeated incumbent Justice Louis Butler. Michele Goodwin, *Expressive Minimalism and Fuzzy Signals: The Judiciary and the Role of Law*, 84 CHI.-KENT L. REV. 19, 22 n.13 (2009). By way of full disclosure, although I did not endorse Justice Gableman or contribute to or participate in his campaign, I commented frequently on issues in the race and was one of a group of critics of what we perceived to be the Wisconsin Supreme Court's move away from traditional practices of judicial restraint. See, e.g., ESENBERG, *supra* note 74. Additionally, I recorded, without compensation, a video for the WMC in which I commented, not on the election, but on my views regarding the direction of the court. See WMCMedia, *Wisconsin Supreme Court Unbound: A Candid Conversation with Professor Rick Esenberg*, YOUTUBE (Feb. 9, 2009), [http://www.youtube.com/watch?v=w06ghly6\\_0Q](http://www.youtube.com/watch?v=w06ghly6_0Q). WMC ultimately used that video to raise funds for independent expenditures in support of Justice Gableman. See, e.g., *Issue Ads: The Wisconsin Supreme Court 2008: What Is at Stake for Wisconsin?*, WMC, <http://www.wmc.org/display.cfm?ID=1735> (last visited Nov. 1, 2010). However, I refused to permit a request for funds to be embedded in the video itself. As noted below, I also criticized a Gableman campaign advertisement that is featured prominently in the recusal motions—criticism that was, in fact, cited to the court in support of at least one of the motions. See *infra* note 270.

84. For an example of a recusal motion, see Motion for Recusal of Justice Gableman on Constitutional Grounds, *State v. Allen*, 778 N.W.2d 863 (Wis. 2010) (No. 2007AP795).

85. *Lawyer: Justice Gableman Biased Against Defendants*, FOX 21 NEWS, Oct. 26, 2009, <http://www.fox21online.com/news/lawyer-justice-gableman-biased-against-defendants>.

86. *Wis. Judicial Comm'n v. Gableman (In re Judicial Disciplinary Proceedings Against Gableman)*, 784 N.W.2d 631, 633 (Wis. 2010).

87. *Id.* at 634.

88. See, e.g., Motion for Recusal of Justice Gableman on Constitutional Grounds, *supra* note 84, at 27–28; see also Penny J. White, “*The Appeal*” to the Masses, 86 DENV. U. L. REV. 251, 259 & n.70 (2008) (highlighting the speech used by third parties in Justice Gableman's election).

concerned citizens. The parties (all criminal defendants) filing these motions argue that Justice Gableman will feel a “debt of gratitude” that can only be repaid by ruling against the claims of criminal defendants.<sup>89</sup> In other words, Justice Gableman will be biased by adhering to what appears to be, however crudely expressed, a political or legal view of the proper balance between the demands of public safety and the rights and interests of the accused. This is indeed *Caperton* uncabined.

I share Professor Karlan’s skepticism that such motions are likely to be successful. But, in Wisconsin, they have not been denied. Although Justice Gableman denied the motion in one of the cases, the full court deadlocked on whether it had the authority to order recusal of a peer justice.<sup>90</sup> Three justices held that the court lacked such authority and three wanted more briefing and argument on the question.<sup>91</sup> Because the court deadlocked, the motion was not granted.<sup>92</sup>

Commenting on *Caperton*, Chief Justice Shirley Abrahamson (a member of the group that wanted more briefing and argument on the issue) suggested that it should not be treated as an “outlier” but as an “important statement about the constitutional requirement of fair tribunals.”<sup>93</sup> She questioned whether “extreme facts” ought to be the appropriate standard.<sup>94</sup> Justice David Prosser (a member of the group that believed the court lacked authority to order recusal) lamented that “[t]o date, the *Caperton* decision has had disastrous consequences for the Wisconsin Supreme Court.”<sup>95</sup>

As addressed more fully below, the Gableman motions, like *Caperton* itself, may address an “extreme” case,<sup>96</sup> but as judicial

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89. See, e.g., Motion for Recusal of Justice Gableman on Constitutional Grounds, *supra* note 84.

90. State v. Allen, 778 N.W.2d 863, 863 (Wis. 2010). The *Allen* court also made clear that it regarded the motions as facially deficient, arguing that *Caperton* ought to be limited to allegations of a financial interest, bias for or against a particular litigant, or bias against a constitutionally protected class. See *id.* at 920–21 (Roggensack, J., concurring).

91. Compare *id.* at 889–90 (majority opinion) (showing three justices requesting additional briefs), with *id.* at 873 (showing three justices who believe the court lacks authority to determine recusal motions).

92. *Id.* at 863. Additionally, although motions in other cases remain pending, it seems unlikely that any of them will be granted.

93. *Id.* at 880.

94. *Id.* at 886; accord *id.* (referring favorably to Justice Stevens’s view that a campaign promise to be “tough on crime” should require recusal, and that determining when “‘tough on crime’ judicial electioneering” risks deprive a criminal defendant of due process is “[n]ot an easy question but an important one”).

95. *Id.* at 924 (Prosser, J., concurring).

96. A similarly “extreme” case occurred in Michigan when an attorney representing the plaintiff in a wrongful-death action moved to recuse all of the conservative members of the Michigan Supreme Court because of bias stemming from criticism that the attorney had directed toward each of the



racers become, in the words of one commentator, “nastier, noisier, and costlier,”<sup>97</sup> similar motions responding to either “tough on crime” or “populist” campaigning would not be surprising. An early draft of a report of the American Bar Association’s Judicial Disqualification Project noted an increased willingness of judicial candidates to take positions on disputed legal issues and stated that:

[O]ne might reasonably speculate that judicial candidates who seek voter support by taking firm positions on issues they are likely to decide as judges will be reluctant to disqualify themselves when those issues arise, insofar as the voters who supported them are, in effect, counting on their candidate to make decisions they were elected to make.<sup>98</sup>

## II. RECUSAL AND THE FIRST AMENDMENT

In the past several years, the Court has recognized a robust right of free speech for judicial candidates.<sup>99</sup> It has found an increasingly unfettered right for individuals and organizations to engage in independent communications with respect to elections or issues pertaining to elections.<sup>100</sup> The Court has held that, at least under certain circumstances, the right to engage in electoral advocacy may not be burdened by state action designed to counter or diminish the impact of that communication.<sup>101</sup> It is notable that in each of these cases, Justice Kennedy joined with the *Caperton*

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judges and ten-year-old critical statements made by one the judges. *Pellegrino v. AMPCO Sys. Parking*, 777 N.W.2d 144 (Mich. 2010); *see also* Margaret Agius, *Michigan Supreme Court Denies Fieger Motion for Disqualification*, EXAMINER.COM (Jan. 30, 2010), <http://www.examiner.com/x-14309-Detroit-Legal-News-Examiner~y2010m1d30-Michigan-Supreme-Court-denies-Fieger-motion-for-disqualification> (discussing allegations of bias regarding three justices on the Michigan Supreme Court made by the plaintiff’s attorney). The attorney even argued, in support of his motion, that the voting pattern of the justices reflected bias against his firm (i.e., they had not supported his clients’ positions). Agius, *supra*. Two of the justices denied the motions individually, and a third motion, filed after the court changed its rules to require recusal motions to be referred to the entire court, was denied by the remaining four justices. *Id.*

97. Roy A. Schotland, *Comment*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

98. Standing Comm. on Judicial Independence, Am. Bar Ass’n, Report of the Judicial Disqualification Project 46 (Sept. 2008) (unpublished draft), *available at* <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf>.

99. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that a canon of judicial conduct that prohibits candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment).

100. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007).

101. *See, e.g.*, *Davis v. FEC*, 128 S. Ct. 2759, 2771–74 (2008).

dissenters in five-to-four decisions.<sup>102</sup> It may be that Justice Kennedy's emphasis on the sui generis nature of *Caperton* is, in the words of Hoersting and Smith, an attempt to "address a case that, on its facts, seemed to shock the conscience—without damaging Kennedy's longstanding position in campaign finance cases that judicial elections are much like other elections, and that independent election expenditures enjoy the highest constitutional protection."<sup>103</sup> If that is so, then the limits of *Caperton* are found not in its facts or in Justice Kennedy's repeated expressions of disbelief that such a thing could happen or is likely ever to happen again, but in the Court's own free speech doctrine. *Caperton* may not be limited to a single train on a single day, but it ought not to be applied expansively.

#### A. *Speech Rights for Judicial Candidates*

##### 1. *Republican Party of Minnesota v. White*

The most important of the judicial-speech-rights cases is *Republican Party of Minnesota v. White*<sup>104</sup> because of how it reconciles the state's interest in reducing the potential for or appearance of judicial bias with the free speech rights of judicial candidates. In recognizing a rather broad right of judicial candidates to speak during an election free of the strictures of ethical canons,<sup>105</sup> the Court established certain principles regarding the nature of judicial bias and the reconciliation of judicial elections with judicial independence. These principles may help us to read *Caperton*.

At issue in *White* was Minnesota's Code of Judicial Conduct's "announce clause," which forbade judicial candidates from announcing their position on disputed legal or political issues.<sup>106</sup> The Court found that the clause was an unconstitutional burden on speech, impeding the ability of elected public officials to express themselves on matters of public importance.<sup>107</sup> The restriction could not, in the Court's view, be justified by the state's interest in

102. Compare *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256 (2009) (listing the members of the dissent as Justices Roberts, Scalia, Thomas, and Alito), with *Citizens United*, 130 S. Ct. at 886 (listing the members of the majority as including Justice Kennedy and the *Caperton* dissenters), *Davis*, 128 S. Ct. at 2765 (same), *Wis. Right to Life, Inc.*, 551 U.S. at 454 (same), and *White*, 536 U.S. at 766 (listing the members of the majority as including Justices Kennedy, Scalia, and Thomas).

103. Hoersting & Smith, *supra* note 52, at 320. Attorney Hoersting and Professor Smith were struck by Justice Kennedy's repeated references to what were expenditures as contributions. *Id.* at 344–45.

104. 536 U.S. 765 (2002).

105. *Id.* at 788.

106. *Id.* at 768.

107. *Id.* at 781–82, 788.

assuring the fact or appearance of judicial impartiality.<sup>108</sup> In assessing that interest, Justice Scalia, writing for a five-justice majority, identified three senses in which a judge may be impartial. His taxonomy is useful for the discussion that follows.

First, impartiality might require that a judge ought to be impartial as between specific parties, i.e., each litigant should expect that a judge will apply the law to him in the same way as she applies it to every other party.<sup>109</sup> This was the sense of impartiality claimed to be lacking in *Caperton* and the line of cases on which it relied.

Second, impartiality may require that a judge lack any preconception on a particular legal issue.<sup>110</sup> Accordingly, a judge who, prior to any proceeding before her, believes that a state constitutional mandate of equal protection requires legal recognition of same-sex marriage is not impartial. For the *White* majority, that interest cannot justify restrictions on speech. In fact, it is not a legitimate interest at all. According to Justice Scalia, “A judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice[;] it is virtually impossible to find a judge who does not have preconceptions about the law.”<sup>111</sup> In fact, that a judge’s mind would be a tabula rasa on significant legal issues, “would be evidence of lack of qualification, not lack of bias.”<sup>112</sup> In Justice Scalia’s view, the state’s interest in that form of impartiality can never constitute a compelling interest.

Finally, impartiality may require open-mindedness, i.e., a willingness “to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case,”<sup>113</sup> not the lack of any preconception about an issue. “This sort of impartiality,” according to Justice Scalia, “seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.”<sup>114</sup> The *White* Court assumed, but did not decide, that the state may have a compelling interest in ensuring impartiality in this third sense.<sup>115</sup> It concluded, however, that the “announce clause” was not narrowly tailored to ensure the fact or appearance of impartiality in this sense.<sup>116</sup> In the view of the majority, statements made by a judicial candidate outside of the context of a judicial election or while holding judicial office are just

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108. *Id.* at 777.

109. *Id.* at 775–76.

110. *Id.* at 777.

111. *Id.*

112. *Id.* at 778 (quoting *Laird v. Tatum*, 409 U.S. 824, 836 (1972)) (internal quotation marks omitted).

113. *Id.*

114. *Id.*

115. *See id.*

116. *Id.* at 780.

as likely to create (or not to create) a public perception of close-mindedness.<sup>117</sup> Noting that “campaign promises are—by long democratic tradition—the least binding form of human commitment,” Justice Scalia expressed skepticism that nonpromissory statements could ever form the basis for concern regarding a judge’s impartiality and that, in any event, “[d]ebate on the qualifications of candidates’ is ‘at the core of our electoral process and of the First Amendment freedoms,’ not at the edges.”<sup>118</sup>

For the dissent, the unique nature of the judicial role makes the particular views of a judicial candidate less important. Because judges “do not sit as representatives of particular persons, communities, or parties” and “serve no faction or constituency,” “[i]t is the business of judges to be indifferent to popularity.”<sup>119</sup> Because of this, according to Justice Ginsburg, “the public’s ability to choose agents who will act at its behest” is not only unnecessary in judicial races, it is, in some sense, antithetical to the judicial role.<sup>120</sup> She echoed the “legal” model of the judicial role:

Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide “individual cases and controversies” on individual records, neutrally applying legal principles, and, when necessary, “stand[ing] up to what is generally supreme in a democracy: the popular will.”<sup>121</sup>

Justice Ginsburg expressly rejected Justice Scalia’s taxonomy of bias, arguing that considerations of judicial bias “do not focus solely on bias against a particular party, but rather inquire more broadly into whether the surrounding circumstances and incentives compromise the judge’s ability faithfully to discharge her assigned duties.”<sup>122</sup> She offered a broad reading of the Court’s earlier cases on judicial bias that would later inform the opinions of both the majority and dissent in *Caperton*:

These cases establish three propositions important to this dispute. First, a litigant is deprived of due process where the judge who hears his case has a “direct, personal, substantial, and pecuniary” interest in ruling against him. Second, this interest need not be as direct as it was in *Tumey*, where the

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117. *See id.* at 778–81.

118. *Id.* at 780–81 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989)).

119. *Id.* at 806 (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 401 n.29 (1991)).

120. *Id.*

121. *Id.* at 803–804 (citations omitted).

122. *Id.* at 815 n.3.

judge was essentially compensated for each conviction he obtained; the interest may stem, as in *Ward*, from the judge's knowledge that his success and tenure in office depend on certain outcomes. "[T]he test," we have said, "is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge [that] might lead him not to hold the balance nice, clear and true.'" And third, due process does not require a showing that the judge is actually biased as a result of his self-interest. Rather, our cases have "always endeavored to prevent even the probability of unfairness." "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."<sup>123</sup>

For Justice Ginsburg, "When [an elected] judicial candidate promises to rule a certain way on an issue that may later reach the courts, . . . she will be under pressure to resist the pleas of litigants who advance positions contrary to her pledges on the campaign trail."<sup>124</sup> This, she continued, would result in the judge having a "direct, personal, substantial, [and] pecuniary interest' in ruling against certain litigants, for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election."<sup>125</sup> A prohibition against the mere "announcement" of a judge's political or legal views is necessary to avoid circumvention on the restriction on pledges or promises.<sup>126</sup>

## 2. *White and the Judicial Role*

*White* certainly reflects a strong view of the constitutional free speech imperative. The case has been criticized as an expression of First Amendment "formalism" that fails to take into account the unique nature of the judicial role.<sup>127</sup> Those Justices composing the majority in *White* have generally been suspicious of government

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123. *Id.* at 815 (citations omitted).

124. *Id.* at 816.

125. *Id.* (citation omitted) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

126. *See id.* at 819–21.

127. *See, e.g.*, Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 317–19 (2003) (arguing that the *White* Court's "attachment to existing constitutional categories 'election' and 'speech'" led to an "all or nothing" approach that privileged the First Amendment above compelling state interests); Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2208 & n.41 (2006) (contrasting Justice Stevens's "focus on the consequences of free speech decisions" with "formal adherence to some libertarian abstraction" evident in decisions such as *White*); Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525, 1528–32 (2003) (asserting in discussion of *White* and related cases that "the law of democracy remains one of the last bastions of legal formalism in constitutional law").

attempts to manage political discourse.<sup>128</sup> But *White* also reflects a particular view of the judicial role as well.

What is that view? *White* might be read as a repudiation of the “traditionalist” or “formalist” models of judicial decision making.<sup>129</sup> On this view, judges do not rely on personal preferences or philosophies but apply rules of law that can be, for the most part, discerned and applied without relying on individual policy preference and world views.<sup>130</sup> In dissent, Justice Stevens echoed this model, writing that while judges may personally hold particular issue stances, they put these aside in deciding cases.<sup>131</sup> To the extent this is true, information about those views is irrelevant and a candidate’s claim or implication that they may be considered in deciding cases is “illegitimate.”<sup>132</sup> It is not only unnecessary to the process of judicial selection but potentially harmful in that it may lead the public to demand—and judges to provide—decisions that owe more to what the public wants than what the law requires.<sup>133</sup>

Other models for judicial behavior emphasize the degree to which considerations other than “the facts and law” influence

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128. Justices Kennedy, Scalia, and Thomas have generally voted to limit restrictions of campaign expenditures and speech, often joined by former Chief Justice Rehnquist. *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 894 (2010); *see also* Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1757–59 (2001).

129. *See, e.g.*, Anca Cornis-Pop, *Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right To Strike Down the Clause*, 40 WILLAMETTE L. REV. 123, 124–25 (2004); Michael R. Diminio, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 339–42 (2003).

130. *See, e.g.*, Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 981 (2001) (asserting that judges should decide based on “the evidence and the law, not on public opinion polls, personal whim, prejudice or fear, or interference from the legislative or the executive branches or private citizens or groups”); Cornis-Pop, *supra* note 129, at 154 (“[T]he legal model holds that judges routinely can and do set aside all personal and external biases in exercising their discretion and deciding cases based on the facts and law before them.”); Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 59 (2000) (asserting that judges should have a “culture and cast of mind that approaches the interpretive task as guided by principles that rise above personal or partisan likes or dislikes”).

131. *See White*, 536 U.S. at 798 (Stevens, J., dissenting).

132. Daniel Burke, *Code of Judicial Conduct Canon 7B(1)(c): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 GEO. J. LEGAL ETHICS 181, 183 (1993).

133. *See* Pozen, *supra* note 62, at 273 (“[Under a formalist view of the judicial process,] elections would not offer voters any meaningful choices, and an appointive scheme would seem preferable as a way to economize on selection costs and to ensure that candidates have the necessary technical qualifications.”).

judicial decision making. The classic attitudinal model, for example, argues that judicial decision making is primarily—or at least substantially—affected by a judge's personal values and policy preferences.<sup>134</sup> If “judges are motivated by their personal policy preferences, the announce clause precludes discussion of issues that are relevant to voters' candidate choices.”<sup>135</sup>

*White* certainly recognized the public's interest in seeking—and a candidate's right to provide—information about a candidate's political or legal viewpoints and the ways in which those viewpoints may impact adjudication. It accepts the idea that the voters may hold judges accountable for adjudicatory outcomes. If that recognition was, in fact, rooted in a view that judges have wide latitude to incorporate their personal views into decision making, there would be a certain irony in play. The dissenters in *White*—Justices Stevens, Souter, Ginsberg, and Breyer—have arguably seen “legal” constraints on judicial decision making as less extensive and the role of considerations of policy and “extralegal” values as more important to the process of judging.<sup>136</sup> Justice Scalia, of course, is more likely to see the judicial process as the lawyerly business of discerning the meaning of a text and applying it in accordance with that meaning and less likely to resort to considerations of policy and other matters outside the text.<sup>137</sup>

The argument over *White*'s consistency with the judicial role mirrors a similar argument over judicial elections in general. David Pozen recently argued that:

...elective judiciaries can be seen as the real-world compatriots of the critical legal studies (CLS) and law and economics movements, in that each sees judicial decisionmaking in instrumental terms. As with the CLS-style judge pursuing elite domination or the economic-minded judge pursuing efficiency, the elected judge with an eye on the polls is pursuing something other than the best legal answer. Or, rather, her vision of the best legal answer may be conditioned on something—public opinion—that cannot be found in any accepted legal or moral source.<sup>138</sup>

If *White* is seen as a case about the validation of an

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134. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993).

135. Cornis-Pop, *supra* note 129, at 126.

136. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 399 n.27 (1991) (Stevens, J.) (“A judge brings to his or her job of interpreting texts ‘a well-considered judgment of what is best for the community.’ As the concurrence notes, Justice Holmes and Justice Cardozo each wrote eloquently about the ‘policymaking nature of the judicial function.’” (citation omitted)).

137. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (describing Justice Scalia's interpretive philosophy).

138. Pozen, *supra* note 62, at 290.

instrumental view of the judicial role, this would have rather jarring implications. I would have sooner expected to see the “wolf . . . dwell with the lamb”<sup>139</sup> than Antonin Scalia sharing the jurisprudential insights of Roberto Unger.

But, as most commentators recognize, real-world views of the judicial role cannot be reduced to caricatures of judicial activism (“judges do what they want”) and judicial restraint (“judges are technicians”). Few believe that the judicial process is that simple.<sup>140</sup> *White* does recognize that judges differ in the way in which they apply the law in ways that have nothing to do with experience and qualifications, but that is a commonplace observation that cannot explain the difference between the majority and the dissent and is of limited value in discerning what the case might tell us about resolving the tension between the impartiality that is claimed to be rooted in judicial independence and the type of accountability sought by the election of judges.

To the contrary, most lawyers and judges subscribe to some form of the “strategic” model of judicial decision making.<sup>141</sup> That model recognizes that while judges are influenced by their policy preferences and may even wish to decide cases in accordance with them, there are institutional values and external constraints that restrain their ability to do so, such as legal texts, norms of opinion writing, precedent, constraints imposed by other branches of government, the institutional interests of the judiciary, and internalization of notions of judicial restraint and public opinion.<sup>142</sup>

Within this broad recognition of judicial limitations and license, there are certain tensions. There is what has been referred to as the “countermajoritarian difficulty,” the tension between judicial review and the legitimacy conferred by the consent of the governed to a particular law or public policy. In other words, “[T]he moral and political problem posed by the power of courts to invalidate legislation supported by democratic majorities (or at least legislative ones).”<sup>143</sup> To the extent that judges decide cases based on their own notions of what constitutes good or bad law or policy, their interference with the political branches raises questions of legitimacy.

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139. *Isaiah* 11:6 (King James) (“The wolf also shall dwell with the lamb, and the leopard shall lie down with the kid; and the calf and the young lion and the fatling together; and a little child shall lead them.”).

140. See Cornis-Pop, *supra* note 129, at 154; Pozen, *supra* note 62, at 273–74.

141. See Cornis-Pop, *supra* note 129, at 163–65 (describing the “strategic” model of judicial decision making).

142. *Id.* at 163–64.

143. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2364 (2006); accord ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986) (discussing the “counter-majoritarian difficulty”).



But there is also the “majoritarian difficulty,” i.e., recognition of the ways in which the fear of, or a commitment to respect, public opinion might compromise judicial independence.<sup>144</sup> No one believes that judges should simply provide the public what it wants.<sup>145</sup> The application of even clear and democratically adopted legal standards—for example, to exclude an improperly obtained confession or to dismiss the claims of an injured plaintiff—may be unpopular. The public may be unable to appreciate the ways in which the rule of law may lead to unpopular results. Public pressures may cause judicial candidates to commit to certain positions that interfere with disinterested discernment and application of the law.

If, as David Pozen writes, “the countermajoritarian difficulty asks ‘how unelected/unaccountable judges can be justified in a regime committed to democracy,’ the majoritarian difficulty asks ‘how elected/accountable judges can be justified in a regime committed to constitutionalism.’”<sup>146</sup> White says something about the second question based on insights derived from the first. If judges exercise discretion that is influenced by their personal values, policy preferences, and preconceptions regarding legal questions, then considerations of legitimacy require that these matters be known and considered by those who select them. If judicial selection is committed to voters, then the accountability to public opinion cannot, without more, deprive a litigant of due process.

This tension is mirrored in calls for, on the one hand, judicial independence and, on the other, judicial accountability—concepts that are themselves in tension.<sup>147</sup>

i. *Deemphasis of the Majoritarian Difficulty: Accountability Matters.* It is almost obligatory in articles about judicial election and recusal to recite former California Supreme Court Justice Otto

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144. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995).

145. See N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring) (observing that it is sometimes “difficult to reconcile” elections with the desire for “a functioning judiciary respected for its independence, its professional attainments and the absolute probity of its judges”); Chisom v. Roemer, 501 U.S. 380, 400 (1991) (noting that judges must sometimes defy the popular will); *id.* at 411 (Scalia, J., dissenting) (explaining that a judge’s duty to represent the law often requires her “to rule against the People”).

146. Pozen, *supra* note 62, at 279.

147. See Judge Diane S. Sykes, Independence v. Accountability: Finding a Balance Amidst the Changing Politics of State-Court Judicial Selection, Address Before the Eastern District of Wisconsin Bar Association (Apr. 17, 2008), in 92 MARQ. L. REV. 341, 349 (2008) (“Elections operate as an external constraint on state judges’ job performance. There is no question that this weakens judicial independence—that’s the whole point. Independence and accountability are important, but conflicting, values.”).

Kaus's evolving zoological similes regarding the impact of judicial elections on controversial cases. At one time, he likened the matter to "finding a crocodile in your bathtub when you go to shave in the morning . . . . You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."<sup>148</sup> Later, perhaps seeking a less gendered approach, he said: "[w]hen you're eating dinner with a gorilla, it's hard to make small talk, even when he's using the right knife and fork."<sup>149</sup>

An emphasis on the majoritarian difficulty may well lead to calls, if not for the abolition of judicial elections,<sup>150</sup> for a certain type of election in which appeals to public opinion and discussion of adjudicatory outcomes and legal or political issues are severely limited.<sup>151</sup> Debate in these elections would tend to be platitudinous, largely concerned with qualifications, experience, and the recitation of uncontroversial (and uninformative) profundities. They would be, as once observed, "about as exciting as a game of checkers. Played by mail."<sup>152</sup> They would be the sleepy old judicial elections that some have come to love and would love to preserve.

More than one commentator has suggested that judicial silence on controverted matters is necessary to bolster public confidence in the judiciary and acceptance of judicial decisions.<sup>153</sup> Even if the cognoscenti are aware that judging cannot be reduced to an entirely dispassionate discernment of "the law," it is best if the public believes this to be so, i.e., there is a state interest in encouraging what my old torts professor, Duncan Kennedy, referred to as "lay formalism." Others have expressed a lack of confidence in the capacity of voters to assess the qualifications of judicial candidates. For some, electing judges is the equivalent of electing nuclear

148. Maura Dolan, *Court Is Feeling the Heat on Prop. 8: Justices Risk Recall If They Vote To Overturn the State's Ban on Same-Sex Marriage*, L.A. TIMES, Nov. 19, 2008, at A1 (internal quotation marks omitted).

149. Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at A3.

150. Justice Ginsburg and former Justice O'Connor have done just that. See generally Robert Barnes, *Ginsburg Would Forbid Judicial Elections*, WASH. POST, Mar. 12, 2010, at A2; John Schwartz, *Effort Begun To Abolish the Election of Judges*, N.Y. TIMES, Dec. 24, 2009, at A12.

151. Pozen refers to accommodationists who seek to limit the salience of judicial elections and the exchange of information, not because they support judicial elections, but because they wish to limit them "as a second-best strategy in a world in which judicial elections are not likely to go away anytime soon." Pozen, *supra* note 62, at 309. It is not that they think that limiting competition, speech, participation, and turnout are good things, but they seek not to make judicial elections "as good as possible," but rather, "as inoffensive as possible." *Id.* It is a "fundamentally defensive creed." *Id.* at 312.

152. William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race: Hernando Attorney Challenging Cobb*, COMM. APPEAL (Memphis), Oct. 29, 2000, at DS1.

153. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting); Burke, *supra* note 132, at 182–83.

physicists.<sup>154</sup>

As noted above, few lawyers—and no member of the Court—would deny the need for judges to resist public pressure—at least when the law requires a ruling that is unpopular. Support for an appointive judiciary or nostalgia for the old, sleepy judicial election is often justified by a desire to insulate judges from public pressure. One might expect that those who believe that there is likely a clear legal answer would value judicial independence more than those who see the law as “underdetermined” and leaving relatively greater room for the exercise of judicial discretion and judicial policy making. Emphasis on judicial independence (in response to the majoritarian difficulty) is often supported by a view of judicial discretion that is cabined by the internal constraints of what Justice Scalia calls “lawyer’s business.”<sup>155</sup> Hamilton thought that the independence conferred on judges appointed for life would protect “the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves.”<sup>156</sup> He saw it as the “best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”<sup>157</sup> But he also saw a judiciary “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>158</sup>

But perhaps Hamilton’s associationism of judicial traditionalism with a high degree of institutional independence is not quite right. It may well be that those who hold to the “traditionalist” view of the judiciary or to a form of the strategic model of voting that views the institutional and normative constraints on judicial decision making as relatively strong are less concerned with the need to shield judges from public opinion by

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154. See Pozen, *supra* note 62, at 293 n.124 (“Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently. That is a decisive objection to . . . elect[ing] judges.” (quoting Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006) (internal quotation marks omitted)). But see Abrahamson, *supra* note 130, at 995 (“Underlying the debate about appointed versus elected judges is a fundamental disagreement about the capacity of the voters to choose wisely. If the people need more information, it is our task to provide it.”).

155. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting).

156. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

157. *Id.* at 465.

158. *Id.* at 471; accord *Roper v. Simmons*, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting) (arguing that a view of the Constitution as “evolving” makes a “mockery” of Hamilton’s expectations).

rendering judicial elections less salient and substantive.

If judges are significantly constrained by legal texts and maxims of opinion writing, then the ability of the public to exert “improper” influence on the judicial process is limited.<sup>159</sup> If judges internalize—and the public demands—a more modest view of the judicial role, the potential for intolerable compromise of judicial independence is less likely. These constraints—as well as public expectations—temper judicial populism and relieve the majoritarian difficulty.<sup>160</sup> Of course, it could be argued that the campaign discussion of issues and cases expands, rather than limits, the scope of discretion. But there is certainly empirical evidence that calls into question the notion that federal judges are the countermajoritarian heroes that some may want them to be.<sup>161</sup>

In contrast, the threat to judicial independence from judicial elections and robust campaign speech may be more intractable to those with a more expansive view of the judicial role. These jurists may emphasize the countermajoritarian nature of the judiciary not so much as a “difficulty,” but as a virtue. On this view, the exercise of judicial discretion within that range of choices free from the type of constraints recognized by the strategic model ought to be exercised, insofar as is possible, free of public opinion. Judges are to act as a restraint on democratic excess not only by holding a democracy to the decisions it has made but also by protecting it from improvident decisions or by making certain “essential” decisions when the political processes have “failed” to do so. Indeed, it may well be that those jurists who believe that judges have more room for the interpretation of “undetermined texts” and for the importation of policy considerations into decision making are those less favorably disposed to public influence on the process. In fact, Justice Ginsburg’s dissent in *White* emphasizes not so much the freedom to discern and apply something like “a brooding omnipresence in the sky,”<sup>162</sup> but the need for a judge to act—to “discern” or “choose” whatever standard or methodology will inform

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159. Professor Croley argued that the views of those who subscribe to a rather narrow concept of judicial review, requiring a relatively clear constitutional proscription before invalidating legislation, might be perfectly consistent with elective judiciaries. See Croley, *supra* note 144, at 753–60. Pozen argues, as noted in the text here, that this may not be so if majoritarian sentiment causes judges to ignore clear legal commands. See Pozen, *supra* note 62, at 280 n.65.

160. See Sykes, *supra* note 147, at 349 (“[T]he internal constraints on judges operate to prevent [accountability to the electorate] from becoming too great a sacrifice. Most of the time, judges who do not stray too far too fast from the judicial mainstream are reelected, often without opposition.”).

161. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 4–6 (1996) (acknowledging scholarly works that question the countermajoritarian notion of the role of the judiciary); see, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

162. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

her decision making—independently of public opinion.<sup>163</sup> To require—or even to permit—judges to offer their views for public approbation is to undermine this stronger form of judicial independence.<sup>164</sup>

*White* puts paid to the latter view as a justification for the restriction of speech. The Court rejects the idea that the state may protect the countermajoritarian nature of the judicial function by restricting discussion of legal and political issues that may affect judicial decision making. In Justice Scalia's view:

[The] complete separation of the judiciary from the enterprise of "representative government" might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well.<sup>165</sup>

This, he continues, is why judicial elections became popular and the state may not, in the interest of protecting judges from public opinion, "prohibit candidates from communicating relevant information to voters during an election."<sup>166</sup>

In states that have opted for judicial elections, there can be no effort on the part of the state to restrict the flow of information on the grounds that it will render candidates more "responsive" to the public or because voters will misapprehend candidate messages and choose poorly. Thus, Justice Kennedy, concurring in *White*, writes that:

Minnesota may choose to have an elected judiciary. It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards. What Minnesota may not do, however, is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.<sup>167</sup>

*White* recognizes that if judicial elections are to be permitted,

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163. See *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting) (emphasizing that judges must "be indifferent to popularity" and "do what is legally right" even if it is not what "the home crowd" wants, and that the outcome of cases "cannot depend on the will of the public" (internal quotation marks omitted)).

164. Pozen, *supra* note 62, at 327.

165. *White*, 536 U.S. at 784 (majority opinion).

166. *Id.* at 782.

167. *Id.* at 794 (Kennedy, J., concurring).

then judicial independence cannot mean that judges be freed from being held accountable by an electorate that may disapprove of certain adjudicatory outcomes. The restriction of campaign speech is only one way in which popular opinion might affect judicial decision making in an elective system.<sup>168</sup> In fact, the *White* Court observed that “campaign promises are—by long democratic tradition—the least binding form of human commitment.”<sup>169</sup> A number of studies show that judicial candidates may conform their decisions to the perceived preferences of the electorate (or other retention agents) or its preference for “tough-on-crime” judging.<sup>170</sup> This is unrelated to whether a judge has said a word on the subject, and in fact, at least one study finds that judges align their decision making most closely when an election is imminent, irrespective of personal policy preferences.<sup>171</sup> It seems unlikely, then, that prohibiting a candidate from stating his position could ever resolve the majoritarian difficulty in the sense of eliminating or even reducing popular pressure.<sup>172</sup>

Thus, the *White* majority flatly rejected Justice Ginsburg’s view that a judge who fears a decision might cause him to lose support is the equivalent of a “direct, personal, substantial[, and] pecuniary interest” in ruling against certain litigants:<sup>173</sup>

[I]f, as Justice Ginsburg claims, it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process. . . . [These views] are not, however, the views reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges

168. *See id.* at 782 (majority opinion) (“Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue.”).

169. *Id.* at 780. Professor Michelle Friedland observes that at least one contract law casebook and two leading contract law treatises use a case involving a broken campaign promise as an example of the “intention not to be bound” doctrine. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 602 (2004).

170. *See supra* notes 134–35 and accompanying text.

171. *See* Friedland, *supra* note 169, at 621–24.

172. Erwin Chemerinsky argues that a “judge who is trying, consciously or unconsciously, to please the voters will take the politically popular approach, whether or not it was expressed previously.” Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 744 (2002). If the position becomes unpopular, he is likely to abandon it. *Id.* at 744–45. “Either way,” Chemerinsky concludes, “the earlier speech itself makes little difference in the judge’s behavior.” *Id.* at 745.

173. *White*, 536 U.S. at 814 (Ginsburg, J., dissenting) (alteration in original) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (internal quotation marks omitted)).

ever since it was adopted . . . .<sup>174</sup>

In fact, those who believe that judicial discretion is more constrained may well see the emphasis on judicial independence—advocated by those with a more expansive view of the judicial role—as an attempt to mask judicial policy making behind a façade of formalism. This suggests another lesson to be derived from *White*.

ii. *Emphasis of the Countermajoritarian Difficulty: Differing Perspectives Matter.* Although the countermajoritarian difficulty is typically associated with appointed judiciaries, it might also be relevant to elections if voters are denied what may be the most relevant information about competing candidates. *White* says that this information is relevant and, in doing so, reflects changes in the federal confirmation process. Lawyers have always understood that while, for example, Antonin Scalia and Ruth Bader Ginsburg are both brilliant lawyers, they differ dramatically in their approach to the law.<sup>175</sup> Acknowledging and evaluating those differences is an important part of the selection process. Just as the federal confirmation process has become more concerned with a nominee's substantive views,<sup>176</sup> voters have a right to know something about a candidate's legal philosophy and policy preferences. If the legal preconceptions and policy preferences of judges are important to decision making, then they are equally as important to the judicial-selection process. If a state has chosen to elect its judges, then accountability and popular sovereignty require that voters have the ability to assess all pertinent information about a candidate without state interference.

Indeed, some commentators argue that judicial elections relieve the countermajoritarian difficulty.<sup>177</sup> Elections, it is argued, impart

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174. *Id.* at 782–83 (majority opinion).

175. See Phil Brennan, *Justice Scalia: Ruth Ginsburg Is My Best Friend*, NEWSMAX.COM (May 16, 2008), <http://www.newsmax.com/InsideCover/scalia-ginsberg/2008/05/16/id/323695> (noting Justice Scalia statement that Justice Ginsberg's "basic approach is not mine").

176. See, e.g., Adam Liptak, *Kagan's View of the Court Confirmation Process, Before She Was a Part of It*, N.Y. TIMES, May 12, 2010, at A16 (recounting Justice Kagan's view that "many of the votes a Supreme Court justice casts have little to do with technical legal ability and much to do with conceptions of value" (internal quotation marks omitted)); *Awkward: Kagan's Confirmation Hearings Criticism*, CBSNEWS.COM (June 3, 2010), <http://www.cbsnews.com/stories/2010/06/03/politics/main6544287.shtml> (noting that then-U.S. Supreme Court nominee Elena Kagan may be questioned more substantively during her Senate Judiciary Committee hearing).

177. Pozen, *supra* note 62, at 324–25 (citing MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS*, 168 n.17 (1982); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1629 (2006); and Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1083 n.10 (2004)).

democratic legitimacy on the judicial branch and provide for greater public accountability.<sup>178</sup> If that is so—and it is certainly an objective of states that have decided to elect judges—then making those elections meaningful by allowing the public to demand and candidates to provide information that may be pertinent to the adjudication of cases may further that purpose. Some have even argued that judicial elections free state courts to intervene in the political process in “progressive” ways,<sup>179</sup> while others suggest that elected judges are less likely to offend the majority’s wishes and that it may be better “for progressives to turn their back on elective judiciaries, in aspiration if not in advocacy.”<sup>180</sup>

However that may be, *White* rejects the idea that the state can pick and choose what information voters can be trusted with or superintend the way in which it is presented. The decision makes clear that these interests do not justify prohibiting the discussion of legal and political issues—even those issues that may later come before the candidate once elected.<sup>181</sup> It reflects a rather strong skepticism that the state may dictate “how” these issues are to be discussed. If the voters cannot be trusted to evaluate judicial

178. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1157–61 (1999).

179. See Pozen, *supra* note 62, at 325–26 (recounting scholarly work that argues that an elected judiciary has the people’s endorsement to take progressive interpretive views).

180. *Id.* at 327. This is not clear. Whether “progressive” policies favor, as Pozen puts it, “traditionally disadvantaged or despised groups,” *see id.*, they are likely to be advanced by elective judiciaries’ economic populism and may well be served by elective judiciaries. While “tough-on-crime” ads are one form of appeal to majority sentiment, ads attacking a judge’s supposed affinity for insurance companies or manufacturers are another. In fact, some studies show that state courts are just as likely to uphold claims of federal rights. See, e.g., Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233 (1999); Michael E. Solomine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). Others have noted that claims related to gay rights have also done well in state courts. See generally, e.g., William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999). Although a majority of the state supreme courts that have found a state constitutional right to same-sex marriage or civil unions are appointive, some are elective. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (appointive); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (elective). A recent study by Professors Joshua Hall and Russell Sobel concludes that judiciaries in states with merit election systems tend to perform better on the U.S. Chamber of Commerce’s ranking of state legal systems. See generally JOSHUA C. HALL & RUSSELL S. SOBEL, SHOW-ME INST., IS THE ‘MISSOURI PLAN’ GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION (2008), available at [http://www.showmeinstitute.org/docLib/20080515\\_smi\\_study\\_15.pdf](http://www.showmeinstitute.org/docLib/20080515_smi_study_15.pdf).

181. Cf. Chemerinsky, *supra* note 172, at 745 (“I cannot imagine a credible argument that it violates due process for Justice Scalia to sit on abortion cases, though it is absolutely clear as to how he will vote.”).



candidates, then judges ought not be elected. Judicial candidates have opinions on these matters. The opinions matter. Voters are entitled to ask and candidates have a right to tell.

iii. *Judicial Elections Are Different: Independence Still Matters.* The *White* majority, nevertheless, recognized that there is a certain tension between the election of judges and judicial independence. The Court acknowledged that a state has a compelling interest in preventing favoritism for or against particular parties.<sup>182</sup> It also assumed that a state might have a compelling interest in ensuring at least a certain type of judicial open-mindedness.<sup>183</sup>

That interest cannot be preserved by requiring judges to pretend (in public) that they approach each matter with a mind wiped clean—a tabula rasa free of any preconceptions. Nevertheless, unlike legislators and executives, there is a sense in which we believe that a judge ought to be open to argument and willing to change her mind. Categorical commitments by a candidate for governor (“I will never raise taxes”) are acceptable, but the same type of promise by a candidate for judgeship (“Read my lips! No more affirmative action!”) might be different.

Additionally, there may be a sense in which judges are bound to impartiality toward classes of litigants in a way that legislators and executives are not. We may not believe it admirable that a legislator might promise to “fleece the rich” or to “go after big out-of-state companies.” But these statements do not, in and of themselves, raise constitutional concerns. We would not think that they prohibit the legislator from acting on proposals for progressive taxation or more legislation expanding the liability of manufacturers.

Finally, although there is a band of judicial discretion and the law is often undetermined, there are times when it is quite clear. *White*’s recognition of the right of a judge to state views that are relevant in determining how she will exercise her discretion may not apply—or at least not in the same way—to a judicial candidate’s stated intent not to follow the law (“I will never follow *Roe v. Wade*”).

### 3. *The Application of White*

Post-*White* decisions in the lower courts seem generally consistent with these observations. They suggest a robust protection against rules that seek to silence a candidate’s statement of his legal views, whether a blanket prohibition against announcing those views or an application of rules prohibiting pledges, promises, or commitments in a way that effectively prevents a candidate from addressing issues of likely interest to the voters.<sup>184</sup> However, even

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182. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775–77 (2002).

183. *Id.* at 778–81.

184. See, e.g., *Duwe v. Alexander*, 490 F. Supp. 2d 968 (W.D. Wis. 2007).

after *White*, it may be permissible to prohibit candidates from promising to decide a particular case in a particular way (something that would presumably foreclose his willingness to be persuaded to change those views or would mean that he has committed to some predetermined view of the facts as opposed to the law). Consistent with Justice Scalia's recognition of a compelling interest in preventing bias in *White*'s first sense, it may also be permissible to adopt rules or practices that protect against bias toward particular litigants or classes of litigants.

Some courts have extended *White*'s invalidation of "announce clauses" to a variety of canons designed to prevent candidates from "committing or appearing to commit"—or even from "pledging or promising" to adhere to—a particular position.<sup>185</sup> Others have upheld facial challenges to these clauses, but only after narrowing constructions that make clear that these restrictions do not apply to a mere statement of a legal or political position.<sup>186</sup> In *Duwe v. Alexander*,<sup>187</sup> for example, a district court rejected a facial challenge to Wisconsin Supreme Court Rule 60.06(3)(b), which provided that a judge or judicial candidate shall not make, "with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."<sup>188</sup> The court noted that the rule "require[d] an actual commitment to rule a certain way on a case, controversy or issue likely to come before the court."<sup>189</sup> The court concluded that the state does have a compelling interest in assuring impartiality in the third sense addressed by *White*, i.e., open-mindedness.<sup>190</sup> While that interest might not be served by restrictions aimed at the prior expression of a view on a pertinent legal issue, it may be served by a promise to adhere to that position—even one limited to statements made in the context of an election.<sup>191</sup>

But the court upheld an "as applied" challenge, concluding that the rule could not be applied to prohibit responses to a questionnaire that asked, not for commitments, but for a statement of position on legal issues.<sup>192</sup> According to the district judge, "There is a very real distinction between a judge committing to an outcome before the case begins, which renders the proceeding an exercise in futility for

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(holding that a rule that governed speech and conduct of judges violated the First Amendment).

185. *See, e.g.*, N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1024, 1037–42 (D.N.D. 2005).

186. *See, e.g.*, Kan. Judicial Review v. Stout, 196 P.3d 1162 (Kan. 2008).

187. 490 F. Supp. 2d 968.

188. *Id.* at 975–77.

189. *Id.* at 975.

190. *See id.* at 975–76.

191. *See id.* at 976.

192. *See id.* at 976–77.

all involved, and a judge disclosing an opinion and predisposition before the case.”<sup>193</sup> Setting forth one’s views without commitment “is nothing more than acknowledgment of the inescapable truth that thoughtful judicial minds are likely to have considered many issues and formed opinions on them prior to addressing the issue in the context of a case.”<sup>194</sup>

Although *Duwe* rejected a facial challenge to the state’s “pledges or promises” clause, it upheld a facial challenge to Wisconsin Supreme Court Rule 60.04(4)(f), which required a judge to recuse herself when she has made a public statement that “commits, or appears to commit, the judge with respect to . . . an issue in the proceeding [or a] controversy in the proceeding.”<sup>195</sup> The use of the term “appears to commit” extended, or threatened to extend, application of the rule to the mere announcement of a position on a legal or political issue protected by *White*.<sup>196</sup>

Other courts have also struck down canons that prohibit statements that “commit or appear to commit” a candidate with respect to an issue or controversy. In *North Dakota Family Alliance, Inc. v. Bader*,<sup>197</sup> for example, a district court held that “[t]here is no real distinction between announcing one’s views on legal or political issues and making statements that commit, or ‘appear to commit,’ a judicial candidate with respect to cases, controversies, and issues that are likely to come before the court.”<sup>198</sup> *Bader* also upheld a facial challenge to a canon prohibiting “pledges or promises” as well.<sup>199</sup> However, although the court concluded that North Dakota had a compelling interest in ensuring impartiality toward parties, these clauses were too broad to serve that goal.<sup>200</sup> Similarly, in *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*,<sup>201</sup> the district court granted a preliminary injunction against enforcement of Kentucky’s “commits or appears to commit” clauses.<sup>202</sup> However, in the district judge’s view, the state could prohibit a judicial candidate from *promising* to rule in a certain way on an issue likely to face the court, but Kentucky’s restriction was not so limited and could not survive strict scrutiny.<sup>203</sup> Two other courts have reached similar conclusions, although the decision below in each was

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193. *Id.* at 975.

194. *Id.*

195. *Id.* at 977.

196. *Id.*

197. 361 F. Supp. 2d 1021 (D.N.D. 2005).

198. *Id.* at 1041.

199. *Id.* at 1038–42.

200. *Id.* at 1044.

201. 345 F. Supp. 2d 672 (E.D. Ky. 2004).

202. *Id.* at 711–12.

203. *Id.* at 704. The Sixth Circuit declined to stay the injunction. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm’n*, 388 F.3d 224 (6th Cir. 2004).

ultimately dismissed on appeal for lack of ripeness or for mootness.<sup>204</sup>

Like *Duwe*, at least one state court has upheld “pledges or promises” clauses through a narrowing construction. In *Kansas Judicial Review v. Stout*,<sup>205</sup> the Kansas Supreme Court upheld the state’s prohibition of a “pledges or promises” clause construing it in a way that did not prohibit a candidate from announcing his or her personal views on disputed questions.<sup>206</sup> It adopted a similar construction of the “commit or appears to commit” clause stating that it prohibited only statements that bind a candidate to a particular disposition.<sup>207</sup> However, shortly after *White*, the Florida Supreme Court,<sup>208</sup> and the New York Court of Appeals<sup>209</sup> applied such clauses without any readily apparent limiting construction. These cases will be discussed below.

### B. Speech Rights of Interested Parties

*White* is instructive, but there is more. The First Amendment protects not only the rights of candidates to speak, but also the right of third parties to be heard on issues that may be pertinent to a campaign during the election cycle. In *Federal Elections Commission v. Wisconsin Right to Life, Inc.*,<sup>210</sup> for example, the Court recognized a First Amendment right for corporations to engage in issue advocacy during an election.<sup>211</sup> The Court recognized a broad right for persons to comment on matters of public interest—even during an election season and even when the communication mentions a candidate for office and has not been funded in accordance with campaign finance restrictions.<sup>212</sup> In *Citizens United v. Federal Election Commission*,<sup>213</sup> the Court extended that right to independent advocacy for or against the election of a particular candidate.<sup>214</sup>

Both *Citizens United* and *Wisconsin Right to Life* have recognized that independent expenditures do not present the same potential for corruption as do campaign contributions. Writing for

204. See, e.g., *Kan. Judicial Review v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006) (enjoining pledges or promises, commits, and solicitation clauses), *appeal dismissed*, 562 F.3d 1240 (10th Cir. 2009); *Alaska Right to Life Political Action Comm. v. Feldman*, 380 F. Supp. 2d 1080 (D. Alaska 2005) (striking “pledge or promise” and “commit or appears to commit” clauses as unconstitutional), *vacated*, 504 F.3d 840 (9th Cir. 2007).

205. 196 P.3d 1162 (Kan. 2008).

206. *Id.* at 1172–74.

207. *Id.* at 1174–75.

208. See *In re Kinsey*, 842 So. 2d 77, 85–89 (Fla. 2003).

209. See *In re Watson*, 794 N.E.2d 1, 5–8 (N.Y. 2003).

210. 551 U.S. 449 (2007).

211. See *id.* at 469–82.

212. See generally *Wis. Right to Life, Inc.*, 551 U.S. 449.

213. 130 S. Ct. 876 (2010).

214. *Id.*

the majority in *Citizens United*, Justice Kennedy described the rationale behind the distinction:

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,” because “[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>215</sup>

*Caperton*, of course, found a due process duty of recusal based on independent expenditures.<sup>216</sup> Nevertheless, *Citizens United* suggests the contradiction may be less stark than it may have appeared immediately after *Caperton*. Given Justice Kennedy’s distinction between contributions and expenditures and his robust reaffirmation of the distinction in *Citizens United*, it seems unlikely that the Court’s longstanding distinction between contributions and independent expenditures is not pertinent in judicial elections and is not relevant in assessing the scope of *Caperton*. Although—as we have seen—there are problems with this narrative about *Caperton*, Justice Kennedy appears to have seen Blankenship’s expenditures as both unusual and tantamount to contributions.<sup>217</sup>

The recognition of a broad right of independent groups and individuals to speak has two implications. First, it suggests that the ability to police judicial independence through the restriction of candidate speech is limited. If public criticism of judicial decisions exacerbates the majoritarian difficulty, regulation of candidate speech—either directly or through recusal—becomes dramatically underinclusive. While one could argue that the independent statements of a candidate’s supporters can lead or contribute to a duty to recuse (the Gableman recusal motions, discussed above, make precisely that claim), this seems rather attenuated. Candidates have, by definition,<sup>218</sup> no control over what independent supporters may say.

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215. *Id.* at 901–02 (alternation in original) (citations omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976)).

216. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259–67 (2009).

217. Kennedy repeatedly referred to Blankenship’s contributions: “Blankenship contributed some \$3 million”; “[w]hether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry”; “[t]he temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical”; “absent recusal, Justice Benjamin would review a judgment that cost his biggest donor’s company \$50 million”; “Blankenship’s extraordinary contributions.” *Caperton*, 129 S. Ct. at 2264–65.

218. One might argue that independent messages can support a duty to recuse only if the candidate does not disavow them. It is unlikely, however,

Second, *Caperton* notwithstanding, the Court's longstanding distinction of expenditures and contributions says something about the likelihood that expenditures will have an impact on a public official that might support the restriction of speech. Whatever "debt of gratitude" or appearance of improper influence that they create has generally been insufficient to overcome First Amendment protections.

### C. Does Recusal Restrict Speech?

It has been suggested that a constitutionally or statutorily mandated duty of recusal may be considerably broader than permissible restrictions on speech, i.e., it may be triggered by a relatively large amount of speech that is constitutionally protected.<sup>219</sup> The speech engaged in and funded by Blankenship, after all, was certainly constitutionally protected. Justice Kennedy joined the majority in *Citizens United*, *Caperton*, *Wisconsin Right to Life, Inc.*, and *White*.<sup>220</sup> Perhaps, robust protection for campaign speech by judicial candidates and their supporters—at least in his mind—does not mean that this constitutionally protected speech cannot result in a mandatory duty of recusal. Indeed, concurring in *White*, Justice Kennedy wrote that states may "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards," although they may not "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer."<sup>221</sup> He repeated that observation in *Caperton* itself.<sup>222</sup> In *Citizens United*, he wrote, without explanation, that *Caperton* was "limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."<sup>223</sup>

Clearly, due process may require recusal as a result of speech that is protected. There is, to be sure, a "play in the joints" between the right to speak and the duty to recuse in which the former is not always immunized from the latter. Nevertheless, the extent and nature of the right to speak ought to tell us something about the extent and nature of the duty to recuse. To recognize a large "play in the joints" would be overly dismissive of the interests recognized by *White* and the campaign finance cases. Just as with the

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that disavowal will have much impact on the public's reaction to independently sponsored messages and that, therefore, disavowal will reduce whatever pressure the public places on a judge. Nor is it clear that disavowal will dissuade independent supporters from spending money.

219. See *infra* notes 227–29 and accompanying text.

220. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Caperton*, 129 S. Ct. 2252; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

221. *White*, 536 U.S. at 794 (Kennedy, J., concurring).

222. *Caperton*, 129 S. Ct. at 2267.

223. *Citizens United*, 130 S. Ct. at 910.

continuing viability of the distinction between expenditures and contributions, Justice Kennedy's emphasis on the extraordinary nature of the *Caperton* facts may prove to be important. As noted above, Kennedy's *Caperton* opinion tended to elide the distinction between contributions and expenditures—a distinction that Justice Kennedy strongly reaffirmed in *Citizens United*. He joined the *White* majority, and it seems unlikely that he believes that aggressive recusal requirements do not restrict speech.

In *Davis v. Federal Election Commission*,<sup>224</sup> the Court, with Justice Kennedy in the majority, struck down a federal statute that increased campaign contribution limits and lifted the cap on coordinated party expenditures for candidates who face a self-financing opponent whose spending has exceeded a specified amount.<sup>225</sup> This so-called millionaire's amendment was held to burden the exercise of the self-financing candidate's right to advocate for her own election.<sup>226</sup> The burden was, of course, a benefit to the opponent, rendering her own speech less effective. If the price of candidate or third-party speech on an issue is disqualification of a judge from ever addressing that issue, then it would seem that the right to speak has been effectively undermined. *Davis* cautions against burdening the free speech rights of candidates, even in indirect ways.

*Duwe* is also instructive. In passing on the constitutionality of Wisconsin Supreme Court Rule 60.04(4)(f), the court held that the fact that these provisions did not purport to prohibit restricted speech but only to require recusal did not render *White* inapplicable:

While it is true that the recusal requirement is not a direct regulation of speech, the chilling effect on judicial candidates is likely to be the same. Although a candidate would not fear immediate repercussions from the speech, the candidate would be equally dissuaded from speaking by the knowledge that recusal would be mandated in any case raising an issue on which he or she announced a position.<sup>227</sup>

A broad reading of *Caperton* would permit a candidate or his supporters to exercise their right to speak on political and legal issues only at the expense of the candidate being unable to address those issues if elected. The impact is likely to be the suppression of speech. It is, in fact, the objective of such a reading. Requiring recusal when a candidate has announced his or her views would be, in the view of Professor Roy Schotland, "an inspired step."<sup>228</sup> It

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224. 128 S. Ct. 2759 (2008).

225. *Id.* at 2770–72.

226. *Id.* at 2766, 2772.

227. *Duwe v. Alexander*, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007).

228. Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419–20 (2003); accord Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the*

would provide candidates cover to say that “I know what you’d like me to say, but if I go into that then I’ll be unable to sit in just the cases you care about most.”<sup>229</sup>

The impact of a broad recusal right, then, would tend to inhibit or limit interested parties’ participation in judicial elections. While some might suggest that a limitation is just what is needed, driving out the participation of groups and individuals affected by the courts is unlikely to lead to Athenian democracy but to a process dominated by incumbents, media, and the bar. This is impossible to reconcile with *White* except in the most formalist and didactic of ways—you can speak, but, if you do, your speech and what it conveys to voters will become irrelevant. This is, in *White*’s sense, to deny voters the information that they need to make an intelligent choice between candidates.

Broad recusal rights are likely, moreover, to lead to what the *Caperton* minority feared and Justice Kennedy said would not (and, at least implicitly, should not) happen: strategic attempts to remove judges thought to be unfavorable to a litigant’s position.<sup>230</sup> Although this may be manageable at the level of a trial court, it is problematic for multimember appellate courts in which voters have presumably elected each judge to sit, insofar as is possible, on all cases. Recusal, particularly in courts of last resort, frustrates the public will and impedes the development of the law. Even when state law provides for the appointment of a replacement, the public’s choice of judges—often on issues of great public importance—is frustrated.

Although the same cases that struck down clauses prohibiting “pledges or promises” or statements that “commit or appear to commit” candidates to a particular position have upheld canons requiring recusal when, among other things, a “judge’s impartiality could reasonably be questioned,” they do not describe what circumstances require recusal or when recusal can be required as a result of protected speech. If, as seems to be the case, speech that cannot be restricted may lead to recusal, it is necessary to attend to the framework of *White* and the campaign finance cases.

### III. THE IMPLICATIONS OF THE FIRST AMENDMENT FOR *CAPERTON*

As noted above, the *Caperton* majority and the dissent differed on the importance of announcing a well-defined standard that would guide application of what is likely to be seen as a broader due

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*Post-White Era*, 94 KY. L.J. 1, 14 (2005) (warning of the dangers of mandatory recusal); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 709 (2007) (“Finally, the existence of a recusal process will give judicial candidates ‘cover’ to avoid making promises or commitments during campaigns in particular or during the course of the judicial service.”).

229. Schotland, *supra* note 228, at 1420.

230. See Rotunda, *supra* note 60, at 265.



process right to (and duty of) recusal. Chief Justice Roberts predicted mischief as lawyers play the *Caperton* card,<sup>231</sup> while Justice Kennedy thought it sufficient unto the day to say that, whatever the Due Process Clause might require in another case, it called for the recusal of Justice Benjamin in the matter before the Court.<sup>232</sup>

As Professor Karlan observes, this division reflects a long-running debate over the manner in which courts should monitor the political process:

*Caperton* ties into a longstanding methodological debate over judicial intervention in the political process. On the one hand, theories of representation reinforcement, most notably John Hart Ely's, have identified an antientrenchment rationale for judicial review: a court actually promotes democracy when it overturns decisions made by political insiders stacking the deck and "choking off the channels of political change to ensure that they will stay in and the outs will stay out." On the other hand, fear of embroiling the judiciary in the "political thicket" creates strong pressure for the Supreme Court to intervene only when it can identify and articulate an objective test for adjudicating politics-related claims.<sup>233</sup>

For example, Professor Lessig, otherwise sympathetic to *Caperton* and concerned about the impact of campaign contributions and expenditures on judicial impartiality, also expresses concern about the decision's fidelity to the judicial role.<sup>234</sup> Lessig questions whether the decision will weaken the institution of the judiciary by "unnecessarily forcing it" to make "judgments that cannot help but appear political, or because the rule it seeks to implement is predictably unadministratable[.]"<sup>235</sup> These risks, he says, were "dramatically remarked" by Chief Justice Roberts's dissent.<sup>236</sup>

As noted earlier, some argue that *Caperton* motions will be rare,<sup>237</sup> but, as Professor Karlan observes, the impact of *Caperton* is not limited to—and may not even be principally a result of—adjudicated recusal motions.<sup>238</sup> Recusal motions will be directed, at least in the first instance, to the judge whose impartiality is questioned and the federal review will be confined to the Supreme Court, limiting the opportunity for clarification of just what due

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231. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267–75 (2009) (Roberts, C.J., dissenting).

232. *Id.* at 2262–65 (majority opinion).

233. Karlan, *supra* note 53, at 95 (footnotes omitted).

234. See Lessig, *supra* note 75, at 113.

235. *Id.*

236. *Id.* at 114.

237. See, e.g., Green, *supra* note 56, at 233.

238. Karlan, *supra* note 53, at 100–01.

process requires.<sup>239</sup> This, in my view, underscores, rather than diminishes, the need for clear direction. If the *Caperton* rule is likely to be a machine that runs off itself, then greater clarity as to its proper use is in order.

In a forthcoming paper, Professors Andrey Spektor and Michael Zuckerman argue that the tension between a strong due process imperative for recusal and the speech rights of judicial candidates and their supporters calls for a limit on *Caperton* and suggest using the balancing test announced in *Matthews v. Eldridge*.<sup>240</sup> Although *Matthews* certainly describes, in a fashion, what one must do to resolve this tension, standing alone, it, like most “balancing tests,” is characterized by an inclusivity that is both a virtue and vice. A direction to consider all pertinent factors can be almost no direction at all.<sup>241</sup> It is my belief that the Court’s First Amendment jurisprudence can tell us something about how the scales will tip.

#### A. Candidate Speech

##### 1. Statement of Position on Legal or Political Issues

One thing seems easy. The expression of a position on a legal issue—at least as long as it does not rise to the level of a “promise” or “pledge”—is not only constitutionally protected, but does not, given *White*, give rise to the type of bias that the state has an interest in preventing. Having a view on a legal or political issue is not the type of bias with which the state may concern itself.<sup>242</sup> The fact that a judge might feel pressure to rule in a way that is consistent with his earlier stated position or with public opinion does not give rise to due process concerns of sufficient gravity to justify the restriction of speech.<sup>243</sup>

But perhaps it’s not so easy. Some have argued—and some

239. *Id.* at 100.

240. Andrey Spektor & Michael Zuckerman, *Judicial Recusal & Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. (forthcoming 2010) (manuscript at 31–42), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1564385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564385). The *Matthews* test requires a balancing of:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

241. *Cf.* *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (proclaiming that the balancing test set forth by the Court in the case “is more like judging whether a particular line is longer than a particular rock is heavy”).

242. *Republican Party of Minn. v. White*, 536 U.S. 765, 777–78 (2002).

243. *See id.* at 782–83.

post-*White* decisions have held—that a judge ought not “promise” to rule in a particular way.<sup>244</sup> The Kansas Supreme Court distinguishes between a question that asks “[w]hat is your stance on abortion?” and “[d]o you vow to overturn *Roe v. Wade*?”<sup>245</sup> The former would likely be “a permissible pronouncement of a personal view on a disputed legal issue,” while the latter would “impermissibly bind a candidate to a particular legal action.”<sup>246</sup> While this is fair enough, it masks a variety of intermediate approaches. What of a candidate who criticizes *Roe* or who announces that, in her view, the Constitution does not protect a right of privacy or that such a right ought not to extend to abortion? *White* would seem to compel the conclusion that this does not constitute impermissible bias.

One might distinguish between statements of law—e.g., a claim that sexual orientation ought to be considered a suspect classification—and legal conclusions that presumably require attention to findings of fact that a candidate could not have made—e.g., an expression of the view that a state’s method of financing schools unconstitutionally discriminates on the basis of race (when such a conclusion requires factual inquiries as to intent or impact) or a commitment to “always” sentence sexual offenders to the maximum term of confinement when state law requires consideration of mitigating factors. Thus, while a candidate may, as one commentator has suggested, promise to give harsher, or perhaps even higher, sentences for drunk drivers,<sup>247</sup> she may not do so in a way that suggests she will not consider all that sentencing law requires.

And perhaps candidates must avoid the language of promise or commitment.<sup>248</sup> For Justice Ginsburg, this was a distinction without a difference,<sup>249</sup> but it may serve the state’s interest in preserving open-mindedness—not in the sense of having no preconceptions—but of being open to persuasion. Although Justice Ginsburg thought this easily evaded, the very need for a judge to remain committed to listen may underscore institutional constraints related to opinion writing and the consideration of evidence and arguments.

## 2. *Statements of Bias Against Classes of Litigants*

Although *White* quite clearly suggests that statements of a candidate’s legal or political views do not create due process

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244. See, e.g., *In re Kinsey*, 842 So. 2d 77, 87 (Fla. 2003); Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625 (2005).

245. *Kan. Judicial Review v. Stout*, 196 P.3d 1162, 1176 (Kan. 2008).

246. *Id.*

247. Friedland, *supra* note 169, at 596.

248. See *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

249. *Id.* at 819–20 (Ginsburg, J., dissenting).

problems,<sup>250</sup> it remains the case that bias against a litigant—at least based on extra record sources—might. To what extent can this interest be expanded to a class of litigants? There are certainly ways in which it can be. Bias against a “suspect class” or on a “suspect basis”—i.e., race, gender, ethnicity, religion—might require recusal. The Court has, for example, said that a judge’s statement that “[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans’ because their ‘hearts are reeking with disloyalty’”<sup>251</sup> constituted disqualifying bias (albeit on a statutory basis) in an espionage case against ethnic Germans.<sup>252</sup> More recently, a judge was disciplined for what were regarded to be biased statements against white people.<sup>253</sup>

But again, the matter is not simple. The Mississippi Supreme Court, for example, refused to discipline a judge who wrote a letter to a newspaper in which he said that “gays and lesbians should be put in some type of mental institute” and who told a radio interviewer that homosexuality was a disease that required treatment, rather than punishment.<sup>254</sup> The judge had claimed that these views were rooted in his Christian beliefs, and the court indeed found them to be constitutionally protected.<sup>255</sup> The court observed (without addressing the merits) that the judge would “doubtless face a recusal motion from every gay and lesbian citizen who visits his court.”<sup>256</sup>

It may be easy to conclude that there would be a duty for this judge to recuse himself from matters involving gay or lesbian litigants, but it is not hard to imagine a more difficult case, such as a statement on the part of a judge opposing same-sex marriage or affirming “traditional” sexual morality. One is also reminded of our ongoing debates over whether certain statements and positions are implicitly racist.<sup>257</sup> In my view, this difficulty, while real, is unlikely to prove unmanageable. We can expect most judges to stay well clear of the line, and it is, in any event, a line that courts—who must often address allegations of discriminatory intent—have

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250. *Id.* at 776–78.

251. *Liteky v. United States*, 510 U.S. 540, 555 (1994) (alteration in original) (quoting *Berger v. United States*, 255 U.S. 22, 28 (1921)).

252. *Berger*, 255 U.S. at 36.

253. *Miss. Comm’n on Judicial Performance v. Osborne*, 11 So. 3d 107, 109, 118 (Miss. 2009) (quoting Judge Osborne as follows: “White folks don’t praise you unless you’re a damn fool. Unless they think they can use you. If you have your own mind and know what you’re doing, they don’t want you around.”).

254. *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008–09, 1016 (Miss. 2004).

255. *Id.* at 1013–16.

256. *Id.* at 1015.

257. Indeed, some have argued that certain ads at issue in the Gableman recusal motions were implicitly racist. See Felicia Thomas-Lynn, *NAACP Decries Campaign Ad*, MILWAUKEE J. SENTINEL (Mar. 18, 2008), <http://www.jsonline.com/news/statepolitics/29497054.html>.

traditionally policed.

A larger problem is the potential for recasting statements of position as statements of bias. Criminal defendants—or, for that matter, defendants in products liability cases—often face a common set of legal issues on which jurists may reasonably differ. Judges may differ in their assessments of the rights claims of defendants based on interpretive method, assumptions regarding the way in which power is exercised in society, differences in confidence regarding the adjudicative process, and varying judgments about the proper balance to be struck between collective security and individual liberty. Judges' differing views on products liability may be rooted in disagreements concerning the efficacy of markets or the capacity of the legal system to efficiently allocate the costs of injuries without creating economic inefficiency. These sound suspiciously like the differing perspectives on legal and political issues that do not create a constitutionally significant risk of impartiality.

But complications will inevitably arise from the nature of political speech. A candidate or her supporters are unlikely to produce a thirty-second spot in which the candidate says that, in her view, courts have gone beyond the original meaning and intent of the protection against self-incrimination and struck an improper balance between the desire to ensure voluntary confessions and the needs of effective law enforcement. In campaign ads directed toward voters whose understandings and (perhaps more importantly) attention spans are limited, she is likely to say something more like that the court has coddled criminals and that she will be tougher. A candidate will probably not explain that her opponent has failed to appreciate the need to allocate the cost of injuries caused by prescription medicines to drug manufacturers so that they can be spread across all users. She may well say that he is "in the pocket" of the drug companies.

One might argue that such statements constitute bias in *White's* first sense, i.e., they create the appearance of bias against a class of litigants rather than a predisposition toward a particular legal position. If we believe that recusal is a more limited restriction on speech than discipline, then it would certainly seem that recusal is both a permissible—and potentially constitutionally mandated—remedy for statements that are claimed to express an impermissible potential for bias against a class of litigants, e.g., claims of bias against criminal defendants.

There is some authority for this. In a pre-*White* case, a judge was disciplined (albeit only with a warning) for stating that he was "very tough on crimes" when there are victims who have been physically harmed and that he had "no feelings for the criminal."<sup>258</sup>

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258. See Bruce Hight, *Judge Violated Conduct Code, Panel Decides*, AUSTIN AM. STATESMAN, Jan. 31, 2001, at B1 (describing Texas Court of Criminal

In a post-*White* matter, a judge was disciplined for distributing leaflets that stated, “your police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . *behind bars!*” and “[a]bove all else, [the candidate] identifies with the victims of crime.”<sup>259</sup> In another case, a judge was publicly censured for saying that “[w]e need a city court judge who will work together with our local police department to help return Lockport to the city it once was,” and suggesting that a judge should use bail and sentencing to deter crime.<sup>260</sup>

But this seems to go too far. In *Aetna Life Insurance Co. v. Lavoie*, for example, the Court concluded that allegations of a judge’s general hostility toward insurance companies did not compel his recusal.<sup>261</sup> “[O]nly in the most extreme of cases,” it observed, “would disqualification [for bias or prejudice] be constitutionally required.”<sup>262</sup> Thirty-second ads criticizing a decision excluding evidence or failing to uphold a verdict in favor of a seriously injured plaintiff will leave much unsaid. But that is in the nature of politics, and the ads are constitutionally protected, given a state’s choice to elect judges and *White*’s limitation of the state interest in preventing bias. To require a judge who, in *White*’s language, is “communicating relevant information to voters during an election” from sitting on cases in which that “relevant information” matters would render *White*’s protection of campaign speech for judicial candidates chimerical and would be wholly inconsistent with *White*’s foundational premises concerning the judicial role.

### 3. *Statements of Refusal To Follow the Law*

An additional (and perhaps more serious) objection to much judicial campaign speech—particularly promises to be “tough on crime”—is that it rarely addresses the legal issues that ought to control the disposition of cases. Judges are castigated for using “loopholes” to release defendants without regard to the strength or weakness of the defendants’ claims.<sup>263</sup> That the “loophole” may have

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Appeals Judge Tom Price’s campaign statements).

259. *In re Kinsey*, 842 So. 2d 77, 87–89 (Fla. 2003) (alteration in original) (finding judge violated state code of judicial conduct and punishing her with censure and fine).

260. *In re Watson*, 794 N.E.2d 1, 3–5 (N.Y. 2003). The candidate also sent out a letter to law enforcement personnel asking for their support in “put[ting] a real prosecutor on the bench,” and stating that “[w]e need a judge who will assist our law enforcement officers as they aggressively work towards cleaning up our city streets.” *Id.* at 2.

261. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820–21 (1986).

262. *Id.* at 821.

263. See Andrew Clevenger, *Roane Judge Dismisses Priest’s 1991 Molestation Charges*, CHARLESTON GAZETTE (Aug. 30, 2010), <http://wvgazette.com/News/201008300958> (“[I]t’s important that suspected child predators not walk free because of legal technicalities.” (internal quotation marks omitted)).

consisted of an important constitutional guarantee or that the result was mandated by decisions of the United States Supreme Court is unlikely to become part of the broad public debate. Terms like “loophole” become shorthand for a legal position that has an undesired consequence and, although the speaker may have something more than a consequentialist objection, whatever that is goes unexplained. In this, judicial campaigns reflect political advertising in general, which is characterized by gross oversimplification and, when addressing the positions of an opponent, by bad faith. If sufficiently egregious, this could lead to a probability of bias sufficient to warrant recusal.

The controversy concerning the recusal of Wisconsin Supreme Court Justice Michael Gableman illustrates the problem. The Gableman campaign ran a much-criticized ad attacking his opponent, incumbent Justice Louis Butler, for representing a convicted rapist.<sup>264</sup> The ad, now the subject of a disciplinary proceeding against Justice Gableman,<sup>265</sup> said that “Butler found a loophole” and the rapist went on to offend again.<sup>266</sup> In fact, the “loophole” that Butler found was held to be harmless error and his client offended only after serving a prison term.<sup>267</sup> Gableman generally promised to be tough on crime, and both he and independent supporters repeatedly referred to the fact that Butler had been a public defender and had earned the nickname “Loophole

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264. The audio text of the ad was as follows:

Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true! Judge, District Attorney Michael Gableman has committed his life to locking up criminals to keep families safe—putting child molesters behind bars for over one hundred years. Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an eleven-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

GreaterWisComm, *Gableman Attack Ad*, YOUTUBE (Mar. 30, 2010), <http://www.youtube.com/watch?v=8GquEW0XKcA>.

265. A three-judge panel recommended that the complaint be dismissed. See Wis. Judicial Comm. v. Gableman (*In re Judicial Disciplinary Proceedings Against the Honorable Michael J. Gableman*), No. 2008AP2458-J, at 3–4 (Wis. June 30, 2010). That recommendation is now before the entire Wisconsin Supreme Court. In a possibly ironic twist, Justice Gableman moved to recuse Justice Patrick Crooks for statements made in his writing in the case addressing the recusal motions. Justice Crooks denied the motion. Patrick Marley, *Justice Crooks To Stay on Gableman Ethics Case*, MILWAUKEE-WIS. J., SENTINEL (Mar. 29, 2010), <http://www.jsonline.com/news/statepolitics/89463092.html>.

266. Bill Lueders, *Gableman—Unfit for Any Office*, ISTHMUS: THE DAILY PAGE (Mar. 27, 2008), <http://www.thedailypage.com/isthmus/article.php?article=22072>.

267. Marcia Coyle, *Judicial Campaign Speech Case May Be Destined for Supreme Court*, LAW.COM (Sept. 22, 2009), <http://www.law.com/jsp/article.jsp?id=1202433962977>.

Louie.”<sup>268</sup>

The recusal motions have argued that these ads reflect a prejudice against a specific class of litigants—criminal defendants.<sup>269</sup> It is bias in *White*’s first sense and can certainly form the basis for recusal. Although I think the ad was misleading and unfair, I am not convinced that it warrants recusal. “Tough-on-crime” campaigning reflects, however crudely, a normative position that courts have used their discretion in a way that provides too much protection to criminal defendants. Judges do differ on such questions and, after *White*, they are entitled to communicate those differences to the voters.

If there is a problem with tough-on-crime campaigning, it is that it suggests that a judge won’t follow the law, i.e., that a judge will rule against criminal defendants regardless of what the law requires. But given the limits and mores of campaigning, a duty to recuse would seem to require an extraordinarily direct and broad statement of bias against defendants as a class. At minimum, the key may be whether a statement can be read as a statement of legal position (“my opponents sentences are too light,” or even “my opponent unnecessarily finds loopholes that allow criminals to go free”) as opposed to being a clear statement of bias (“the testimony of law enforcement officers should be believed”) or of a refusal to consider what the law may require to be taken into account (“I have no feeling for the criminal”).<sup>270</sup>

## B. Campaign Support and Recusal

### 1. Expenditures Are of Less Concern Than Are Contributions

Although *Caperton* involved, for the most part, independent expenditures,<sup>271</sup> and *White* concerned candidate speech,<sup>272</sup> robust constitutional protection of campaign speech is not limited to candidates. It will presumably take an extraordinary and extreme independent effort to lead to a duty of recusal. As noted above, the Court has long distinguished between expenditures and contributions, holding that the former does not present the same

268. *Hijacking Justice 2008: Issue Ads in the 2008 Supreme Court Campaign*, WIS. DEMOCRACY CAMPAIGN (Feb. 22, 2008), <http://www.wisdc.org/hijackjustice08issueads.php>.

269. See, e.g., Motion for Recusal of the Honorable Michael Gableman on Constitutional Grounds at 28, *State v. Carter*, No. 2006AP1811-CR (Wis. 2009), available at <http://www.wisspd.org/html/appellate/CCRM.pdf>.

270. Although I criticized the Mitchell ad at the time it was aired, see Rick Esenberg, *Supreme Court Ads*, SHARK & SHEPHERD (Mar. 17, 2008, 7:40 PM), <http://sharkandshepherd.blogspot.com/2008/03/supreme-court-ads.html>, I am not persuaded that it, even in combination with other ads and communications in the race, amounts to such a statement of bias.

271. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

272. See generally *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).



potential for actual or apparent corruption.<sup>273</sup> Although Justice Kennedy repeatedly elided the distinction between contributions and expenditures in *Caperton*,<sup>274</sup> the recent reaffirmation in *Citizens United* of the notion that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”<sup>275</sup> suggests that independent expenditures ought to be less likely to lead to a duty of recusal.

Smith and Hoersting argue that the interest in preventing actual or apparent judicial bias is a more narrow interest than the interest in preventing the corruption—or its appearance—thought to justify restrictions on campaign expenditures.<sup>276</sup> Bias, they say, requires “a direct, substantial, personal or pecuniary interest in reaching a conclusion against [a litigant in a] case.”<sup>277</sup> Corruption, they argue, is a necessarily broader concept because bribery is already illegal.<sup>278</sup> Although the state apparently has an interest in preventing the appearance of an improper quid pro quo, they argue that, if independent expenditures cannot give rise to the appearance of corruption, then such expenditures certainly cannot give rise to the appearance of bias.<sup>279</sup>

It is not clear, after *Caperton*, that disqualifying judicial bias is a narrower concept than the type of corruption thought to support restrictions on campaign contributions in general. But the “debt of gratitude” that may be owed to, at least, the support of an independent group representing a particular interest or point of view (as opposed to, as Justice Kennedy seemed to see it, being virtually an alter ego of a particular party with a private interest) is indistinguishable from the type of pressure that may flow from a judge’s recognition of who supports her and how those supporters’ behavior may impact future elections.

## 2. *The Type of Party*

There are at least two issues here. The first is whether an interested party might not be the litigant, but instead some organization or aggregate of organizations or individuals with an interest in the outcome of a case. Assume, for example, that a business organization or association of trial lawyers has strongly supported a particular party. It is likely that there is—or will be—a case in which such an organization is interested. The difficulty with

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273. See, e.g., *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 491 & n.3 (1985); *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976).

274. See *Caperton*, 129 S. Ct. at 263–64.

275. *Citizens United v. FEC*, 130 S. Ct. 876, 884 (2010).

276. Hoersting & Smith, *supra* note 52, at 340.

277. *Id.* at 328 (alteration in original) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)) (internal quotation marks omitted); *accord Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986).

278. Hoersting & Smith, *supra* note 52, at 340.

279. See *id.* at 340–41.

requiring recusal in such cases is that it is a principle that is at war with judicial elections. If a candidate has been strongly supported by individual trial lawyers or business organizations in a sufficient amount, there is no reason to think that the “debt of gratitude” will be any less compelling than would be support from an organized association of trial lawyers or businesses. If that’s right, then the principle turns out to be an admonition against ruling on a case in which an interest group that has strongly supported a candidate has an interest. Again, this seems inconsistent with the rule from *White*: the view that the mere fact that a decision may have political consequences does not create due process concerns of sufficient gravity to justify the restriction of speech.

A more limited duty would presumably turn on the amount of support provided. But interest groups are more likely to be able to provide large amounts of support. Indeed, in *Caperton* itself, trial lawyers were able to spend an amount that was less than, but comparable to, the putatively extraordinary levels of support provided by Blankenship.<sup>280</sup> More fundamentally, that support is likely to be based on a candidate’s perceived sympathy for a view of the law favored by the interest group. The form of bias likely to arise from interest-group support, then, is likely to be a perceived inclination toward a particular legal or political position. As we have seen, such an interest is not sufficiently compelling or threatening to due process to support a duty of recusal. It seems likely that recusal based on independent expenditures will—or should be—limited to large expenditures by individual parties with a particular matter that is pending or imminent.

### 3. *Type of Support*

In theory, there is no reason that endorsements—particularly by a large group—cannot create the same type of “debt of gratitude” that was of concern in *Caperton*. Ironically, the value of such endorsements may become more substantial if mandatory recusal or other limitations on campaign expenditures reduces the ability of individuals and groups to directly support or engage in campaign communication. The “signaling” effect of endorsements (along with the organizational support that many organizations can provide, including mobilization of their own members) will become more important. Certainly, this type of support can lead to feelings of a “debt of gratitude” or to an incentive to rule in a particular way to keep or obtain such support. Indeed, the literature suggests that endorsements and organizational support are critical in low-turnout, low-salience elections.<sup>281</sup>

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280. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009).

281. See, e.g., Charles Kuffner, *Analyzing the Republican Judicial Primaries*, KUFF’S WORLD (May 7, 2010), [http://blogs.chron.com/kuffsworld/2010/05/analyzing\\_the\\_republican\\_judic.html](http://blogs.chron.com/kuffsworld/2010/05/analyzing_the_republican_judic.html); Charles Kuffner, *Another*

As with expenditures, there is no reason to limit the potential for due process recusal to circumstances in which an interested litigant supported a judge. The potential for apparent impropriety or an unacceptable probability of bias is just as likely to stem from opposition to a judge as from support for a judge. In addition, if First Amendment concerns are not thought to place significant restrictions on *Caperton* recusal, there is no reason to believe that a duty of recusal cannot flow from media endorsements in cases in which an endorsing media entity is interested or, depending on how broadly we define an “interest,” is one in which it has taken a position.

But to recognize *Caperton* recusal in such cases would be wholly inconsistent with the framework suggested here. The fact that *Caperton* could be read to apply in such instances further supports the need for a limited reading of its scope.

#### 4. Imminence of Case

One final question might relate to whether the case in which recusal is sought was imminent or anticipated at the time that the campaign support was provided or that the communications were made. It would seem that the appearance of impropriety is strongest when a party who has provided campaign support knew or reasonably anticipated an important case coming before the court.<sup>282</sup> In the absence of such a case, the support looks more like generalized political support that ought not to form the basis for a duty to recuse. This is less clear with campaign speech that either evinces an impermissible bias against a particular party or group or a refusal to apply the law. While the imminence of a case may contribute to the appearance of a quid pro quo or “debt of gratitude,” the shelf life of an expression of impermissible bias would seem to be longer.

#### CONCLUSION

If, as Chief Justice Roberts suggested in dissent, *Caperton* is a hard case that made bad law,<sup>283</sup> the remedy lies within the Court’s own recent jurisprudence regarding the relationship between judicial elections and judicial independence and the First Amendment rights of citizens to participate in the electoral process. It is these cases, and not the unusual nature of *Caperton* itself, that provide the limits that the *Caperton* majority did not.

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*Analysis of the Democratic Judicial Primaries*, OFF THE KUFF (Apr. 6, 2010), <http://offthekuff.com/wp/?p=27265>.

282. See *Caperton*, 129 S. Ct. at 2264 (“The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical.”).

283. *Id.* at 2272 (Roberts, C.J., dissenting).